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In The Supreme Court of the United States

TOBACCO-FREE KIDS ACTION FUND, et al.,

Petitioners,

v.

PHILIP MORRIS USA INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

HOWARD M. CRYSTAL
Counsel of Record
KATHERINE A. MEYER
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Ave., N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206
hcrystal@meyerglitz.com

Counsel for Petitioners

Of counsel:
PROFESSOR G. ROBERT BLAKEY
William J. and Dorothy K. O'Neill Professor of Law
NOTRE DAME LAW SCHOOL*
Notre Dame, Indiana 46556
(574) 631-5717
*for identification only

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether RICO, which authorizes district courts to "prevent and restrain violations" "by issuing appropriate orders, including, but not limited to: ordering any person to *divest himself of any interest, direct or indirect, in any enterprise . . .* ," 18 U.S.C. § 1964(a) (emphasis added), allows the district court to consider, in a case concerning a massive and decades-long fraud involving a product so addictive that millions of consumers who want to quit are unable to do so on their own, requiring the cigarette company respondents to fund targeted public education and tobacco cessation programs should the court find such remedies necessary to "divest" them of their ill-gotten assets – addicted smokers.

2. Whether RICO, which authorizes district courts to "prevent and restrain violations" "by issuing appropriate orders, *including, but not limited to*" certain enumerated remedies, 18 U.S.C. § 1964(a) (emphasis added), allows the district court to consider ordering equitable remedies that include requiring the cigarette company respondents to fund targeted public education and tobacco cessation programs, or to disgorge their illegally-obtained profits.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were granted intervention below, are Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, and National African American Tobacco Prevention Network (hereafter "Public Health Advocates"). They have no parent companies, and do not issue stock.

Respondents are Philip Morris USA Inc., R.J. Reynolds Tobacco Co., Altria Group, Inc., Lorillard Tobacco Co., British American Tobacco (Investments) Ltd., and Brown & Williamson Holdings, Inc. (hereafter "tobacco companies"), as well as The Council for Tobacco Research-USA Inc., The Tobacco Institute, Inc., and Liggett Group, Inc. The United States is also a respondent here.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Interests Of The Public Health Advocates	3
B. RICO Section 1964	4
C. Proceedings Below	6
1. The Lawsuit And The Interlocutory Appeal	6
2. The Trial And The District Court Ruling	8
3. The Court Of Appeals' Final Ruling	13
REASONS FOR GRANTING THE PETITION	14
I. THE COURT OF APPEALS' RULINGS CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS	16

TABLE OF CONTENTS – Continued

Page

II. REVIEW IS ALSO WARRANTED BECAUSE THIS APPEAL CONCERNS A MATTER OF EXCEPTIONAL IMPORTANCE 20

III. TIIE RULINGS BELOW ALSO CONFLICT WITH THIS COURT'S PRECEDENTS 21

A. The Court Of Appeals' Ruling That Public Education and Tobacco Cessation Remedies May Not Be Considered Pursuant To RICO Section 1964(a) Conflicts With This Court's RICO And Antitrust Precedents 21

B. The Court Of Appeals' Rulings Also Conflict With This Court's Precedents Concerning The Scope Of A District Court's Equitable Powers 27

CONCLUSION 32

TABLE OF CONTENTS – Continued

Page

PETITION APPENDIX

United States v. Philip Morris USA Inc., 566 F.3d 1095 (D.C. Cir. 2009) ..... App. 1

United States v. Philip Morris USA Inc., 396 F.3d 1190 (D.C. Cir. 2005) ..... App. 118

United States v. Philip Morris USA Inc., No. 99-2496 (GK) (D.D.C. Aug. 17, 2006) (as amended on Sept. 8, 2006) (Section XI Remedies) ..... App. 208

United States v. Philip Morris USA Inc., No. 99-2496 (GK) (D.D.C. Aug. 17, 2006) (Order No. 1015, Final Judgment and Remedial Order) ..... App. 252

United States v. Philip Morris USA Inc., No. 06-5267 (D.C. Cir. Sept. 22, 2009) (Order on panel rehearing) ..... App. 272

United States v. Philip Morris USA Inc., No. 06-5267 (D.C. Cir. Sept. 22, 2009) (Order on rehearing *en banc*) ..... App. 274

United States v. Philip Morris USA Inc., No. 04-5252 (D.C. Cir. Apr. 19, 2005) (Order on rehearing *en banc*) ..... App. 276

18 U.S.C. § 1964 ..... App. 278

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987) 24

Atlas Life Ins. Co. v. W.I. Southern Inc., 306 U.S. 563 (1939) 30

Boyle v. United States, 129 S. Ct. 2237 (2009) 5, 23

CFTC v. Am. Metals Exch. Corp., 991 F.2d 71 (3d Cir. 1993) 18

CFTC v. Co Petro Mktg. Group, Inc., 680 F.2d 573 (9th Cir. 1982) 19

CFTC v. Hunt, 591 F.2d 1211 (7th Cir. 1979) 18

Chauffeurs, Teamsters, & Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990) 29

De Beers Consol. Mines v. United States, 325 U.S. 212 (1945) 31

Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) 26

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 3

FTC v. Gem Merch. Corp., 87 F.3d 466 (11th Cir. 1996) 18, 19

Ford Motor Co. v. United States, 405 U.S. 562 (1972) 15, 24, 25

Freeman v. Pitts, 503 U.S. 467 (1992) 29

Friends of the Earth v. Laidlaw, 528 U.S. 167 (2000) 19

TABLE OF AUTHORITIES – Continued

Page

Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999) 30

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 30

Helvering v. Mitchell, 303 U.S. 391 (1938) 32

ICC v. B&T Transp. Co., 613 F.2d 1182 (1st Cir. 1980) 18, 19

Int'l Boxing Club v. United States, 358 U.S. 242 (1959) 25

Int'l Salt Co. v. United States, 332 U.S. 392 (1947) 25

J.I. Case Co. v. Borak, 377 U.S. 426 (1964) 26

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) 24

Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996) 32

Mitchell v. Robert DeMarco Jewelry, Inc., 361 U.S. 288 (1960) ..... *passim*

National Org. for Women v. Scheidler, 510 U.S. 249 (1994) 23

Porter v. Warner Holding Co., 328 U.S. 395 (1946) ..... *passim*

Richard v. Hoechst Celanese Chem. Group, 355 F.3d 345 (5th Cir. 2003) 14, 16

Schine Chain Theaters v. United States, 334 U.S. 110 (1948) 25

SEC v. First City Fin. Corp., 890 F.2d 1215 (D.C. Cir. 1989) 18

TABLE OF AUTHORITIES – Continued

Page

SEC v. Cavanagh, 445 F.3d 105 (2d Cir. 2006)....15, 19, 30

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).....5

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).....29

United States v. Carson, 52 F.3d 1173 (2d Cir. 1995).....14, 16

United States v. Coca-Cola Bottling Co. of Los Angeles, 575 F.2d 222 (9th Cir. 1978).....18

United States v. Crescent Amusement Co., 323 U.S. 173 (1945).....24

United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961).....25, 27

United States v. Grinnell Corp., 384 U.S. 563 (1966).....25

United States v. Lane Labs-USA Inc., 427 F.3d 219 (3d Cir. 2005).....17, 19

United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001).....27

United States v. Philip Morris USA Inc., 546 U.S. 960 (2005).....7

United States v. Philip Morris USA Inc., 566 F.3d 1095 (D.C. Cir. 2009).....1

United States v. Philip Morris USA Inc., 396 F.3d 1190 (D.C. Cir. 2005).....1

United States v. Philip Morris USA, Inc., 321 F. Supp. 2d 72 (D.D.C. 2004).....6

TABLE OF AUTHORITIES – Continued

Page

United States v. Philip Morris, Inc., 273 F. Supp. 2d 3 (D.D.C. 2002) 29

United States v. Philip Morris, Inc., 116 F. Supp. 2d 131 (D.D.C. 2000) 6

United States v. Private Sanitation Ind. Ass'n, 914 F. Supp. 895 (E.D.N.Y. 1996) 16

United States v. Rx Depot, Inc., 438 F.3d 1052 (10th Cir. 2006) 14, 17, 19

United States v. Turkette, 452 U.S. 576 (1981) 4, 15, 20, 22, 23

United States v. U.S. Gypsum Co., 340 U.S. 76 (1950) 24

United States v. Universal Mgmt. Servs., Inc., 191 F.3d 750 (6th Cir. 1999) 17, 19

West v. Gibson, 527 U.S. 212 (1999) 30, 31

FEDERAL STATUTES

Pub. L. No. 91-452, § 1 (codified at 18 U.S.C. § 1961 note) 4, 28

Pub. L. No. 91-452, § 904 (codified at 18 U.S.C. § 1961 note) 5

18 U.S.C. § 1962(c) 6

18 U.S.C. § 1962(d) 6

18 U.S.C. § 1964(a) ..... *passim*

18 U.S.C. § 1964(b) 2

21 U.S.C. § 332(a) 17

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e-16(b) 30

42 U.S.C. § 6972(b)(2)(B) 32

LEGISLATIVE MATERIALS

S. Rep. No. 617, 91st Cong., 1st Sess. (1969) 5, 22, 32

115 Cong. Rec. 9567 (1969) 5

116 Cong. Rec. 602 (1970) 24

OTHER AUTHORITIES

1 John N. Pomeroy, *Equity Jurisprudence* § 109 (5th ed. 1941) 27

G. Robert Blakey and Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning And Impact On Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 Am. Crim. L. Rev. 1345 (1996) 31

OPINIONS BELOW

The opinions of the court of appeals are reported at 566 F.3d 1095 (Pet.App.1) and 396 F.3d 1190 (Pet.App.118). The district court's amended final opinion is not reported.[1] The court of appeals orders denying petitions for rehearing *en banc* are not reported. Pet.App.274, 276.

JURISDICTION

The court of appeals' final judgment was entered on May 22, 2009. The orders denying petitions for rehearing and rehearing *en banc* were entered on September 22, 2009. Pet.App.272-75. On December 15, 2009, The Chief Justice granted Petitioners' request for an extension of time to February 19, 2010 to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] The remedies section of the district court's opinion (Pet.App.208), and the final judgment and remedial order (Pet.App.252) are reproduced here. Citations to the district court's findings will refer to specific Findings of Fact ("FF___"), which are reproduced in the Joint Appendix ("C.A.App.") below. C.A.App.1704-3385. References to the district court's legal conclusions will also cite to the amended opinion reproduced in the Joint Appendix below. *E.g.*, Op.___ (C.A.App.___).

STATUTORY PROVISIONS INVOLVED

Section 1964 of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964, is set out in the Appendix. Pet.App.278.

STATEMENT OF THE CASE

In a case brought by the United States pursuant to its authority under 18 U.S.C. § 1964(b), the district court, in an exhaustive decision, concluded that the major manufacturers of cigarettes for decades engaged in, and continue to engage in, a massive coordinated campaign to deceive millions of American consumers, and particularly teenagers, about the toxicity and addictiveness of cigarettes. FF1-4088. The court further concluded that this misconduct violates RICO, and is likely to continue. Op.1498-1612 (C.A.App.3231-345). The court of appeals found no material error in these conclusions.

In an interlocutory ruling prior to the trial, Pet.App.118, and on review of the final judgment, Pet.App.1, the court of appeals ruled that regardless of the evidence before the court RICO § 1964(a) *precludes* the court from even considering whether to impose remedies requiring the tobacco companies to (a) fund targeted public education and tobacco cessation programs, or (b) relinquish to the government the profits they made from their illegal conduct. Because these rulings conflict with decisions of other courts of appeals, raise matters of exceptional

importance, and are inconsistent with this Court's precedents, the Public Health Advocates petition this Court for review.

A. The Interests Of The Public Health Advocates

The tobacco companies sell a product – cigarettes – that is extremely addictive and causes death and disease when used exactly as intended. FF510-33, FF828-40. To obtain new customers and keep them smoking in light of these realities, the record shows that the tobacco companies undertook a coordinated fraud to induce young consumers to begin smoking, to constantly attract new, young smokers to replace those who either manage to quit smoking or who, over time, die from smoking-related diseases, and to discourage and make it more difficult for smokers to quit. FF509-1763; FF2023-4034. As this Court has recognized, "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). The district court found that "[c]igarette smoking and exposure to secondhand smoke . . . *kills nearly 440,000 Americans every year,*" or more than 1200 every single day – a number "substantially greater than the combined annual number of deaths due to illegal drug use, alcohol consumption, automobile accidents, fires, homicides, suicides, and AIDS." FF510 (emphasis added).

The Public Health Advocates are, as the district court observed, "major public health organizations" that have "long experience with smoking and health issues." July 25, 2005 Op.10-11 (C.A.App.1376-77). They intervened in this case to advocate for broader remedies than the government was requesting, *see* Pet.App.13-14, in light of their "clear interest in advancing the public health and in the remedies proposed in this case." Op.14 (C.A.App.1747); *see also* Pet.App.106 (describing intervenors' interests). Effective public education and tobacco cessation programs, would, as the district court observed, "unquestionably serve the public interest," Pet.App.249-50, and are vital to advancing the Public Health Advocates' interests.

B. RICO Section 1964

Congress enacted RICO to provide "'*new remedies* to deal with the unlawful activities of those engaged in organized crime.'" *United States v. Turkette*, 452 U.S. 576, 588 (1981) (quoting Pub. L. No. 91-452, § 1 (codified at 18 U.S.C. § 1961 note)) (emphasis added). To achieve RICO's remedial purposes, § 1964(a) confers broad authorization for district courts to:

> *prevent and restrain* violations of section 1962 . . . by issuing *appropriate orders*, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future

> activities or investments of any person . . . or ordering dissolution or reorganization of any enterprise.

18 U.S.C. § 1964(a) (emphasis added).

As the Senate Report explained, "[a]lthough certain remedies are set out [in § 1964], the list is not exclusive, and the *only limit* on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons." S. Rep. No. 617, 91st Cong., 1st Sess. 160 (1969) (emphasis added). Accordingly, Congress has directed that RICO should "'be liberally construed to effectuate its remedial purposes.'" *Boyle v. United States*, 129 S. Ct. 2237, 2243 (2009) (quoting Pub. L. No. 91-452, § 904 (codified at 18 U.S.C. § 1961 note)). This Court has explained that "if Congress' liberal-construction mandate is to be applied anywhere, it is in section 1964, *where RICO's remedial purposes are most evident.*" *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 n.10 (1985) (emphasis added); *see also* 115 Cong. Rec. 9567 (1969) (RICO Senate sponsor John L. McClellan explaining that "the ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice [which] is not hindered by [this] bill").

C. Proceedings Below

1. The Lawsuit And The Interlocutory Appeal

The United States filed this civil RICO action in 1999, alleging, *inter alia*, that the tobacco companies have engaged in a massive fraudulent scheme designed to deceive, attract and addict consumers, almost all of whom start smoking cigarettes as children. C.A.App.794 (first amended complaint). Asserting violations of RICO § 1962(c) and § 1962(d), 18 U.S.C. §§ 1962(c)-(d), the government alleged that an order requiring the companies to fund public education and tobacco cessation programs, and to disgorge their unlawfully obtained profits, was necessary to redress the companies' misconduct. C.A.App.884-87.

Before the trial, the district court ruled that the equitable authority provided by RICO § 1964(a) includes the authority to require disgorgement. *United States v. Philip Morris USA, Inc.*, 321 F. Supp. 2d 72, 77 (D.D.C. 2004); *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 149-52 (D.D.C. 2000). On interlocutory appeal of that decision a divided panel reversed. Pet.App.118. The majority concluded that § 1964(a) is "limited to forward-looking remedies that are aimed at *future* violations," and that disgorgement is thus impermissible because, in the majority's view, it is always a "backward-looking remedy focused on remedying the effects of past conduct to restore the status quo." Pet.App.135 (emphasis added). The majority also rejected the argument that even if only

forward-looking remedies are permitted, disgorgement can be forward-looking by deterring further RICO violations. Pet.App.138.

Judge Tatel dissented on the grounds that the majority ruling could not be reconciled with this Court's precedents. Pet.App.176-85. He noted that in *Mitchell v. Robert DeMarco Jewelry, Inc.*, 361 U.S. 288, 291-95 (1960), for example, this Court ruled that a provision empowering the district court to "restrain violations" conferred "full equitable powers," which included requiring the defendant to disgorge *back* wages. Pet.App.183; *see also Porter v. Warner Holding Co.*, 328 U.S. 395, 397-99 (1946) (authorizing remedy to "disgorge profits"). As Judge Tatel also observed, the majority decision also conflicted with many decisions of other courts of appeals, several of which have found that disgorgement *can* be granted under RICO § 1964(a), Pet.App.198-99, and others of which have often relied on *Porter* and *Mitchell* to "read general equitable jurisdiction into a variety of statutes that fail to provide explicitly for it." Pet.App.185-86. Judge Tatel further explained that even if the court were limited to remedies aimed at future violations, disgorgement can accomplish that purpose by deterring further misconduct. Pet.App.193-203. By a three-three vote, with three Judges not participating, the court of appeals denied *en banc* review, Pet.App.276, and this Court denied certiorari. *United States v. Philip Morris USA Inc.*, 546 U.S. 960 (2005).

2. The Trial And The District Court Ruling

During a nine-month trial during 2004-05, the government demonstrated that the tobacco company respondents have engaged in a massive fraud that has gone on for decades with devastating consequences for millions of Americans. The government demonstrated that cigarettes are harmful and addictive, and that the companies have long known but publicly denied both of these critical features of their product. FF509-1265. The government further demonstrated that, because of its addictive nature, millions of people who want to quit smoking cigarettes are unable to do so. FF871 ("Every year, an estimated seventeen million people in the United States attempt to quit smoking. Fewer than one and a half million, or 8%, succeed in quitting permanently").

The government also submitted undisputed evidence that the tobacco companies consider young addicted smokers to be financial assets that they seek to acquire and maintain through their marketing efforts. Thus, as one industry memorandum explained, the companies' marketing was designed to "[a]ttract a smoker at the earliest opportunity and let brand loyalty turn that smoker into a *valuable asset.*" C.A.App.5490 (emphasis added). As another industry official candidly explained, "if we hold these YAS [Younger Adult Smokers] for the market average of 7 years, they would be worth *over $2.1 billion in aggregate incremental profit.*" C.A.App.5948 (emphasis in original); *see also* C.A.App.5953 (the "value of

[younger adult smokers] compounds over time"). The government further demonstrated that in order for the tobacco companies to continue to obtain new smokers and keep existing smokers – *i.e.*, to acquire, and maintain, these long-term "[a]ssets," FF2735 – the companies falsely denied, and continue to deny, the adverse health effects of smoking and secondhand smoke, the addictiveness of their products and their manipulation of nicotine to further addiction, their youth marketing efforts, and their use of deceptive health descriptors such as "low tar" and "light" to induce consumers who wish to quit to continue smoking. *See* FF509-1763; FF2023-3862.

During the trial's remedy phase the government did not present evidence supporting disgorgement in light of the interlocutory ruling, but did present evidence to support the need for a targeted public education campaign as well as a tobacco cessation program. *See, e.g.*, C.A.App.1282-92; C.A.App.1275-80; *see also* C.A.App.1182-90.

In post-trial briefing, the Public Health Advocates argued that these remedies are consistent with the plain language of RICO, which expressly authorizes "appropriate orders" that will "divest" the violator of "any interest, direct or indirect," 18 U.S.C. § 1964(a), that it has obtained as a result of the unlawful acts. Post-Trial Brief of Plaintiff-Intervenors ("Post-Trial B.") (Sept. 1, 2005). The Public Health Advocates explained that the power of addiction makes smokers different from other victims of fraud because it is the addictive power of cigarettes that

forces them to continue to financially reward tobacco companies long after the fraud is exposed. *Id.* at 8-36. They further explained that the tobacco companies cannot reasonably challenge the unusual contention that addicted smokers are, in essence, an *asset* from which they continue to benefit, because the companies *own* documents demonstrate that they consider addicted smokers, and particularly young addicted smokers, to be vital long-term assets from which they receive dividends throughout the years these customers continue to purchase cigarettes to satisfy their addiction. *Id.*; *see, e.g.,* C.A.App.5490 (discussing turning customers "into a valuable asset").

The Public Health Advocates thus argued that the court should consider requiring the companies to fund public education to more effectively warn smokers and potential smokers, and to fund tobacco cessation programs targeting addicted smokers as a means of *divesting* the companies of their unlawfully obtained financial interest in the millions of Americans who, because they became addicted to cigarettes while the companies were engaging in fraud, continue to buy them on a regular basis, further enriching the coffers of the very same companies that defrauded them. Post-Trial B. at 26-31. The Public Health Advocates argued that such remedies would also have the effect of deterring further misconduct. *Id.*

In its final ruling, the district court made more than 4000 findings of fact to support its conclusion that the tobacco companies (a) "falsely denied, distorted and minimized the significant adverse health

consequences of smoking for decades"; (b) "concealed and suppressed research data and other evidence that nicotine is addictive"; (c) "falsely denied that they can and do control the level of nicotine delivered in order to create and sustain addiction"; (d) "falsely marketed and promoted low tar/light cigarettes as less harmful than full-flavored cigarettes in order to keep people smoking and sustain corporate revenues"; (e) "publicly denied what they internally acknowledged: that [second-hand smoke] is hazardous to nonsmokers"; and (f) "spent billions of dollars every year on their marketing activities in order to encourage young people to try and then continue purchasing their cigarette products in order to provide the replacement smokers they need to survive." FF509-1763; FF2023-3862. As the court summarized:

> over the course of more than 50 years, Defendants lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as "replacement smokers," about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting, and they abused the legal system to achieve their goal – to make money with little, if any, regard for individual illness and

> suffering, soaring health costs, or the integrity of the legal system.

Op. 1500 (C.A.App.3233-34).

The court also found that cigarettes are the number one cause of premature, preventable death in this country, FF2703, but that because of the addictiveness of the tobacco companies' products it is extremely difficult to stop smoking, *e.g.*, FF868-81 – and that because their addicted customers die prematurely, the tobacco companies market cigarettes to young people *to serve as replacement smokers*. *See, e.g.*, FF2735 (noting a 1978 Philip Morris document titled "The Assets," reporting that the "percentage of smokers in the 17-24 year old age group is up, and the amount smoked per day per young smoker is also up"); FF2636 ("Less than one-third of smokers start after age 18"); FF2963-90 (Joe Camel campaign intended to, and succeeded in, getting young people to begin smoking).

Finally, the court concluded that despite a 1998 settlement with the states and other restrictions on their conduct the companies have continued, and are likely in the future to continue, their RICO violations. Op.1601-12 (C.A.App.3334-45); Op.1603 (C.A.App.3336) ("[t]he evidence in this case clearly establishes that Defendants have not ceased engaging in unlawful activity").

To remedy these violations, the court, *inter alia*, ordered the companies to both issue corrective communications regarding the true health effects of

cigarettes and make documents and other information concerning the companies' misconduct publicly accessible. Final Judgment and Remedial Order ("Final Order") §§ II.B-C (Pet.App.255-69). Although recognizing that the companies' misconduct was likely to continue, Op.1603 (C.A.App.3336), the court also issued a general injunction against further violations. Final Order § II.A.1 (Pet.App.253).[2]

The court recognized that additional equitable remedies, including targeted public education and tobacco cessation programs, "would unquestionably serve the public interest." Pet.App.240-50. However, the court nevertheless concluded that as a matter of law it could not consider the evidence regarding these remedies, or disgorgement, on the grounds that all of these remedies were barred by the court of appeals' interlocutory ruling. *Id.*

3. The Court Of Appeals' Final Ruling

On appeal, a *per curiam* panel affirmed the district court in all material respects, rejecting – with minor exceptions not relevant here – the companies' arguments as to the district court's liability findings and remedies. Pet.App.19-103. With regard to disgorgement and the additional remedies urged by the government and the Public Health Advocates, the

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[2] The court also prohibited descriptors that convey a misleading health message, such as "light" or "low tar." *Id.* § II.A.4 (Pet.App.255).

panel affirmed the district court on the grounds that such remedies were barred by the court's previous interlocutory ruling. Pet.App.107-16. The tobacco companies' petitions for panel rehearing and rehearing *en banc* were denied. Pet.App.272-75.

REASONS FOR GRANTING THE PETITION

In two opinions the court of appeals has ruled that RICO § 1964(a) severely restricts the scope of the district court's equitable authority to consider appropriate remedies in this case. There are compelling reasons for this Court to review these rulings.

First, the rulings below conflict with decisions of other courts of appeals in three respects. Two courts of appeals have ruled that disgorgement *may be* permissible under § 1964(a), which is squarely at odds with the interlocutory ruling in this case barring disgorgement under any circumstances. *See Richard v. Hoechst Celanese Chem. Group*, 355 F.3d 345, 354-55 (5th Cir. 2003); *United States v. Carson*, 52 F.3d 1173, 1181 (2d Cir. 1995). Seven other courts of appeals have concluded that statutes enumerating remedial powers similar to those contained in § 1964(a) grant the *full scope* of the court's equitable authority, which also presents a conflict with the D.C. Circuit's restrictive interpretation of § 1964(a) here. *See, e.g., United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1058-61 (10th Cir. 2006) (finding that a statute empowering the district court to restrain violations

authorizes a disgorgement remedy). Seven courts of appeals have also concluded that equitable remedies such as disgorgement are *forward-looking* because they deter further misconduct, in conflict with the panel majority's ruling here that disgorgement is entirely backward-looking. *See, e.g., SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006) (disgorgement "has the effect of deterring subsequent fraud").

Second, the magnitude of the fraud at issue here and its devastating consequences – illness and death for hundreds of thousands of Americans each year – provides an additional, independent basis for review. While important, the remedies the district court has imposed will by no means provide "complete relief," *Mitchell*, 361 U.S. at 291-92, and review is thus warranted to permit the district court to consider the *full scope* of its equitable power in fashioning those remedies that will best serve RICO's remedial purposes in this unique case.

Third, the court of appeals' holding that the district court has no authority even to consider evidence that requiring the tobacco companies to fund targeted public education and tobacco cessation programs is necessary as a means of divesting them of their ill-gotten gains – *i.e.*, addicted smokers unable to quit – conflicts with this Court's RICO and antitrust precedents, which provide that § 1964(a) authorizes a district court to "divest the association of the fruits of its ill-gotten gains," *Turkette*, 452 U.S. at 585, and thereby "eliminate the effects" of the legal violations. *Ford Motor Co. v. United States*, 405 U.S. 562, 578

(1972). The court's holding, and the interlocutory ruling barring disgorgement, also conflict with this Court's precedents explaining that a statutory grant of equitable authority like the one contained in § 1964(a) encompasses the full scope of a district court's equitable power. *See, e.g., Porter*, 328 U.S. at 398; *Mitchell*, 361 U.S. at 289-93.

I. THE COURT OF APPEALS' RULINGS CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

1. The interlocutory ruling barring disgorgement as a remedy under RICO § 1964(a) under any circumstances conflicts with the holdings of two other courts of appeals that have held that disgorgement *may* be awarded under § 1964(a) if tied to future unlawful conduct. *United States v. Carson*, 52 F.3d at 1181-82; *Richard v. Hoechst Celanese Chem. Group*, 355 F.3d at 355. In *Carson*, the Second Circuit explained that "[a]s a general rule, disgorgement is among the equitable powers available to the district court" in § 1964(a), and that the appropriate measure of disgorgement would be the "gains [that] are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." 52 F.3d at 1181-82. The Fifth Circuit concurred with that interpretation in *Richard v. Hoechst Celanese Chem. Group*, 355 F.3d at 354-55; *see also, e.g., United States v. Private Sanitation Ind. Ass'n*, 914 F. Supp. 895, 900-01 (E.D.N.Y. 1996).

The panel majority in the interlocutory appeal here, in square conflict with these rulings, concluded that the remedial powers conferred by § 1964(a) "*do not extend to disgorgement in civil cases*." Pet.App.141 (emphasis added). As the majority explained, "[w]hile we avoid creating circuit splits when possible, in this case we can find no justification for considering *any* order of disgorgement to be forward-looking as required by § 1964(a)." Pet.App.142 (emphasis added).

2. Further, the rulings of the D.C. Circuit, Second Circuit and Fifth Circuit, which have all concluded that *any* § 1964(a) remedy must address *future* illegal acts, also conflict with rulings of seven other courts of appeals that, interpreting similar provisions in other federal statutes, have followed this Court's precedents in *Porter* and *Mitchell* by authorizing equitable remedies such as disgorgement or restitution *irrespective* of future violations. Most recently, in *United States v. Rx Depot, Inc.*, the Tenth Circuit ruled that § 332(a) of the Federal Food Drug and Cosmetics Act ("FDCA"), 21 U.S.C. § 332(a), which authorizes district courts "to restrain violations," empowered the court to award disgorgement irrespective of the defendant's future conduct. 438 F.3d at 1058; *see also id.* ("we do not think the presence of the term 'restrain' in a statutory grant of general equity jurisdiction is dispositive evidence of Congress' intent to limit remedies to those that are forward-looking"); *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 223 (3d Cir. 2005) (authorizing restitution under FDCA); *United States v. Universal Mgmt. Servs., Inc.*,

191 F.3d 750, 762 (6th Cir. 1999) (restitution authorized under the FDCA). Numerous other courts of appeals have reached the same conclusion in interpreting other similar statutes. *See FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (interpreting the Federal Trade Commission Act); *CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 76 n.9 (3d Cir. 1993) (Commodity Exchange Act); *ICC v. B&T Transp. Co.*, 613 F.2d 1182, 1184-85 (1st Cir. 1980) (Motor Carrier Act); *CFTC v. Hunt*, 591 F.2d 1211, 1222-23 (7th Cir. 1979) (Commodity Exchange Act); *United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 227-30 (9th Cir. 1978) ("prevent and restrain" under antitrust statute construed to authorize contract rescission).

Indeed, the D.C. Circuit *itself* has interpreted the Securities Exchange Act to permit disgorgement simply on the grounds that the security laws "vest jurisdiction in the federal courts." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). The D.C. Circuit's ruling in that context is incompatible with the court's conclusion in this case that disgorgement and the other equitable remedies sought by petitioners are unavailable under civil RICO.

3. Even if § 1964(a) constrained a district court to forward-looking remedies only, the panel's ruling that disgorgement is "a quintessentially backward-looking remedy focused on remedying the effects of past conduct," Pet.App.135, also conflicts with the decisions of seven circuit courts of appeals that have concluded that disgorgement is in fact

forward-looking because it may deter further misconduct. *Cavanagh*, 445 F.3d at 117 (disgorgement "has the effect of deterring subsequent fraud"); *Rx Depot*, 438 F.3d at 1061 ("Disgorgement, which deprives wrongdoers of their ill-gotten gains, deters violations of the law by making illegal activity unprofitable"); *Lane Labs*, 427 F.3d at 229 ("the restitution ordered by the District Court will deter future violations of the [Act] by the Appellants"); *Gem Merch. Corp.*, 87 F.3d at 470; *Universal Mgmt. Servs., Inc.*, 191 F.3d at 762; *CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 583-84 (9th Cir. 1982); *ICC v. B&T Transp. Co.*, 613 F.2d at 1186. As this Court explained in *Porter*, "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Porter*, 328 U.S. at 400; *cf. Friends of the Earth v. Laidlaw*, 528 U.S. 167, 186 (2000) ("it is reasonable for Congress to conclude that an actual award of civil penalties does in fact bring with it a significant quantum of deterrence over and above what is achieved by the mere prospect of such penalties").

Thus, the court of appeals' decisions to preclude the district court from even considering the evidence supporting disgorgement or other equitable remedies – such as targeted public education and tobacco cessation programs – on the basis of the impact of such remedies on the companies' *future* behavior also conflicts with the decisions of other courts of appeals. *See* Pet.App.202 (Tatel, J., dissenting) (noting that "record evidence in this case suggests that disgorgement will in fact 'prevent and restrain'

defendants from committing future RICO violations"); C.A.App.1229 (plaintiffs' expert testimony that public education and tobacco cessation programs will reduce the tobacco companies' incentives for further fraud); *see also* Pet.App.90-92 (upholding corrective statements remedy in light of the impact of those statements on the companies' future conduct).

These conflicts with decisions of other courts of appeals warrant review by this Court.

II. REVIEW IS ALSO WARRANTED BECAUSE THIS APPEAL CONCERNS A MATTER OF EXCEPTIONAL IMPORTANCE.

Review is also warranted in this case in light of the exceptionally important matters at issue. The government brought this civil RICO action to expose and remedy one of the most sophisticated and far-reaching frauds ever undertaken in this country – one that has been inflicted on millions of children and other ordinary law-abiding citizens. As the district court concluded, for decades the tobacco companies succeeded in fraudulently inducing millions of Americans, especially children, to become addicted to their debilitating products. This case was necessary to reign in that misconduct, and, as much as possible, prevent it from continuing to harm the public.

The remedies the district court has thus far imposed are valuable, but they do not deprive the tobacco companies of the "fruits of [their] ill-gotten gains," *Turkette*, 452 U.S. at 585, because they allow

the companies both to *continue to profit* from the sale of cigarettes to the consumers they successfully addicted to their products, and to *retain the profits* they have already reaped as a result of their decades of massive fraud. The fact that the district court was not permitted to evaluate the evidence related to the efficacy of the proposed public education and tobacco cessation programs, or disgorgement, to prevent *future* misconduct by the tobacco companies also warrants review – particularly since the district court found that an existing broad base injunction, the 1998 settlement with the states, was insufficient to do so. Op.1601-12 (C.A.App.3334-45).

III. THE RULINGS BELOW ALSO CONFLICT WITH THIS COURT'S PRECEDENTS.

A. The Court Of Appeals' Ruling That Public Education and Tobacco Cessation Remedies May Not Be Considered Pursuant To RICO Section 1964(a) Conflicts With This Court's RICO And Antitrust Precedents.

1. The court of appeals' ruling that § 1964(a) does not permit the district court to consider requiring the tobacco companies to fund targeted public education and tobacco cessation programs, even if the court were to find that these remedies are necessary as a means of divesting them of their ill-gotten gains – in this unusual case, addicted smokers who, because they are unable to quit, keep providing additional profits to the companies, Pet.App.111 – is

fundamentally inconsistent with this Court's ruling in *Turkette*. 452 U.S. 576. In that case this Court specifically found that § 1964(a) encompasses remedies that will "divest the association of the *fruits of its ill-gotten gains*." *Id.* at 585 (emphasis added). The Court reached this conclusion after an extensive review of RICO's legislative history, emphasizing that the statute was designed to provide:

> *new approaches* that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place *on all available fronts*.

Id. at 591-92 (quoting S. Rep. No. 617 at 79) (emphasis added); *see also id.* at 592 n.14 (discussing legislative history in which Congress recognized the need to address violators' "ill-gotten gains"). Thus, in *Turkette* this Court concluded that § 1964(a) permits the court to address the *consequences* of the enterprise's unlawful activities, for, as the Court observed, in § 1964 "Congress has provided civil remedies *for use when the circumstances so warrant*." *Id.* at 585 (emphasis added).

Here, based on an overwhelming factual record, the district court found that through multiple schemes and organizations, and over many decades, the tobacco companies disseminated false and misleading information about smoking, and that these efforts

were aimed at young people and are a "substantial contributing factor" in their decisions to begin and continue to smoke. FF509-827; FF2630-3023. The record further demonstrates that the companies consider young addicted smokers to be vital long-term assets. *See, e.g.*, C.A.App.5943 ("value of [younger adult smokers] compounds over time"). Therefore the court of appeals erred in ruling that the district court lacks the equitable authority under RICO § 1964(a) to consider whether to require the tobacco companies to pay for public education and tobacco cessation programs as a means of divesting them of addicted smokers who are the "fruits of [their] ill-gotten gains." *Turkette*, 452 U.S. at 585; *see also Boyle*, 129 S. Ct. at 2247 (explaining that the Court has "repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe") (citations omitted); *National Org. for Women v. Scheidler*, 510 U.S. 249, 260 (1994) (rejecting the argument RICO is limited to traditional forms of organized crime such as the mafia, explaining that "Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime") (citations omitted).[3]

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[3] These remedies are also consistent with RICO's overall objectives because, as the district court found, a major goal of the companies' fraud was to addict *teenagers* who could serve as replacement smokers as the companies' older customers died.

(Continued on following page)

2. The ruling below is also in conflict with this Court's precedents under the antitrust laws, on which § 1964 was modeled. *See, e.g., Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151-52 (1987) ("The use of an antitrust model for the development of remedies against organized crime was unquestionably at work when Congress later considered the bill that eventually became RICO."); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) ("Congress consciously patterned civil RICO after [the Clayton] Act."). In that context the Court has repeatedly noted that the district court's authority to remedy violations encompasses remedies designed to deprive violators of "future benefits from their forbidden conduct." *United States v. U.S. Gypsum Co.*, 340 U.S. 76, 89 (1950); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1945) ("[t]hose who violate the Act may not reap the benefits of their violations").

For example, in *Ford Motor Co. v. United States*, the Court affirmed remedies requiring Ford to restore the victim of the unlawful conduct to its prior condition – including insuring that the divested company's future owner would protect worker wages and

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FF2634-46. As RICO sponsor Senator Roman L. Hruska emphasized during debate on RICO, the statute was intended to address the impact of criminal activity – and especially addictive drugs – on young people in particular. 116 Cong. Rec. 602 (1970) ("[o]ne of the most pernicious threats posed by organized crime is to our youth, by making a business out of corrupting the hope of our Nation with deadly narcotics and dangerous drugs").

pensions. 405 U.S. at 572. Emphasizing the district court's "*large discretion to fit the decree to the special needs of the individual case*," the Court recognized that such a decree would serve to "*eliminate the effects*" of the prior legal violation. *Id.* at 573 n.8 (citations omitted) (emphasis added); *see also, e.g., Int'l Boxing Club v. United States*, 358 U.S. 242, 262 (1959) (recognizing that "sometimes relief, to be effective, must go beyond the narrow limits of the proven violation") (citations omitted); *Int'l Salt Co. v. United States*, 332 U.S. 392, 400-01 (1947) (noting courts' "large discretion to model their judgments to fit the exigencies of the particular case").

Similarly, here, the district court had the authority to consider remedies that would "eliminate the effects," *Ford*, 405 U.S. at 573 n.8, of the tobacco companies' misconduct by educating the public about the true health risks of smoking and the nature of addiction, and providing unlawfully addicted smokers who would like to quit with the tools to do so. *See also, e.g., Schine Chain Theaters v. United States*, 334 U.S. 110, 128 (1948) (divestment authorized to "undo what could have been prevented had the [defendants] not outdistanced the government in their unlawful project"); *United States v. Grinnell Corp.*, 384 U.S. 563, 577 (1966) (an adequate antitrust remedy should "deprive the defendants of any of the benefits of the illegal conduct"); *United States v. E.I. du Pont de*

Nemours & Co., 366 U.S. 316, 326 (1961) (relief must be "effective to redress the violations").[4]

The court of appeals sought to distinguish these antitrust precedents by noting that the antitrust laws prohibit the "condition of monopolization" itself, whereas under RICO future violations require "ongoing *acts*, not ongoing conditions." Pet.App.110-11 (emphasis added). This reasoning fails to recognize that under the unique facts of this case the "ongoing condition[ ]," *id.*, at issue is the cigarette *addiction* suffered by millions of Americans *because* of the false information they were provided. Thus, like the monopolist who continues to reap improper profits until the monopoly is broken and competition is restored, here the tobacco companies will *continue* to enrich themselves from their long-term investments in young addicted smokers unless the district court crafts remedies to help these individuals not only learn the truth, but quit smoking should they so choose.

These conflicts with this Court's precedents warrant review.

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[4] Indeed, remedies that would free smokers of their addiction to cigarettes would also be closely analogous to "rescind[ing] a contract induced by fraud" – another remedy this court has explained "may be maintained in equity. . . ." *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 289 (1940); *see also J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (noting that in "suits in equity" under the Securities Exchange Act a court may "fashion a remedy to rescind a fraudulent sale").

B. The Court Of Appeals' Rulings Also Conflict With This Court's Precedents Concerning The Scope Of A District Court's Equitable Powers.

1. The court of appeals' rulings that the district court may not consider evidence about the impact of or need for public education or tobacco cessation remedies, or disgorgement, also conflict with this Court's precedents explaining that, "where district courts are properly acting as courts of equity, they have discretion" to consider all appropriate remedies "unless a statute clearly provides otherwise." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001). As this Court has explained, "only by a '*clear and valid legislative command*,'" *id.* (quoting *Porter*, 328 U.S. at 398) (emphasis added), should a court conclude that a Congressional grant of equitable authority is limited to only certain remedies. Moreover, as the Court has also stressed, where, as here, "the public interest is involved," the court's "equitable powers assume an *even broader and more flexible character* than when only a private controversy is at stake." *Mitchell*, 361 U.S. at 291 (quoting *Porter*, 328 U.S. at 398) (emphasis added); *see also, e.g., E.I. du Pont*, 366 U.S. at 358 n.8 ("'There is in fact *no limit to the[] variety and application*'" of equitable remedies, for "'the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties'") (quoting 1 John

N. Pomeroy, *Equity Jurisprudence* § 109 (5th ed. 1941)) (emphasis added).

In dissenting from the interlocutory ruling, Judge Tatel observed that § 1964 contains no limit on the scope of available equitable remedies. Pet.App.174-86. To the contrary, the broad grant of equitable authority contained in § 1964(a) – which Congress intended to authorize "enhanced sanctions and new remedies," Pub. L. No. 91-452, § 1 (codified at 18 U.S.C. § 1961 note) – is indistinguishable from the statutory authorities upon which this Court in *Porter* and *Mitchell* concluded that a district court may compel a defendant to return the benefits obtained from unlawful conduct.

In *Mitchell*, the Court considered whether a statute authorizing remedies "to restrain violations" authorized an order requiring the defendant to disgorge the wages it had failed to pay as a result of a wrongful discharge. 361 U.S. at 289-90. Rejecting the argument that the authority to "restrain" violations precludes such a remedy, the Court explained that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide *complete relief* in light of statutory purposes." *Id.* at 291-92 (emphasis added). The Court in *Porter* similarly concluded that a broad grant of equitable authority empowered the district court to "decide whatever other issues and give whatever other relief may be necessary under the circumstances," 328 U.S. at 398,

and that "once its equity jurisdiction has been invoked," the district court had the authority to issue "a decree *compelling one to disgorge profits*, rents or property acquired" in violation of the statute. *Id.* (emphasis added).

As Judge Tatel explained in his dissent, Pet.App.176-85, just like the statutes in *Mitchell* and *Porter*, RICO § 1964(a) grants the district court the full scope of its equitable authority to address violations, authorizing the court to issue "appropriate orders, including but not limited to" several general examples of equitable powers. 18 U.S.C. § 1964. This includes the equitable power of disgorgement, *Chauffeurs, Teamsters, & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) ("we have characterized damages as equitable where they are restitutionary, such as in actions for disgorgement of improper profits") (citation omitted), as well as the other equitable remedies that plaintiffs advanced, but the district court has not yet considered here. *See United States v. Philip Morris, Inc.*, 273 F. Supp. 2d 3, 10-11 (D.D.C. 2002) (ruling that public education and smoker cessation remedies are equitable in nature); *see also Freeman v. Pitts*, 503 U.S. 467, 487 (1992) ("The essence of a court's equity power lies in its inherent capacity *to adjust remedies in a feasible and practical way* to eliminate the conditions or redress the injuries caused by unlawful action") (emphasis added); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (noting court's authority to "mould each decree to the necessities of the particular case") (quoting

Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944)) (emphasis added).[5]

2. The panel majority's specific rationale for interpreting § 1964(a) to preclude disgorgement is also at odds with this Court's rulings. The majority invoked the canons *noscitur a sociis* and *ejusdem generis* to conclude that, based on the nature of the remedies listed in § 1964(a), any other appropriate remedies must be "forward-looking" to prevent future RICO violations – which in the panel's view does not include disgorgement. Pet.App.139-40. However, this Court has endorsed the contrary conclusion – that where Congress authorizes appropriate remedies in a statute, "including" several specifically enumerated examples, "the preceding word 'including' makes clear that the authorization *is not limited to the specified remedies there mentioned. . . .*" *West v. Gibson*, 527 U.S. 212, 217 (1999) (citing 42 U.S.C. § 2000e-16(b)) (emphasis added); *see also id.* at 218 ("The word 'including' makes clear that 'appropriate remedies' are not limited to the examples that follow the word").

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[5] Disgorgement is within a court's equitable power because it was an accepted remedy in "'the English Court of Chancery at the time of the separation of the two countries.'" *Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting *Atlas Life Ins. Co. v. W.I. Southern Inc.*, 306 U.S. 563, 568 (1939)); *see also SEC v. Cavanagh*, 445 F.3d at 120 ("English equity courts compelled the repayment (in effect, 'disgorgement') of ill-gotten gains in cases decided before our independence").

In *West* even the dissent, which would have read the provision at issue more *narrowly*, invoked *noscitur a sociis* and *ejusdem generis* to conclude that appropriate remedies should be "of the same nature as" the equitable remedies listed – "*i.e. equitable remedies*." *Id.* at 225 (Kennedy, J., dissenting) (emphasis added); *see also id.* at 226 ("[t]he phrase 'appropriate remedies,' furthermore, connotes the remedial discretion which is the hallmark of equity"). The court of appeals majority's invocation of these canons to reach the *opposite* conclusion in this case is inconsistent with these precedents. *See also De Beers Consol. Mines v. United States*, 325 U.S. 212, 218-19 (1945) (explaining that the authority conferred in the term "prevent and restrain" in the Sherman Act "is to be exercised according to the general principles which govern the granting of equitable relief"); *cf.* G. Robert Blakey and Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning And Impact On Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 Am. Crim. L. Rev. 1345, 1627 App. E (1996) (explaining that the term "prevent and restrain" is "a typical, common law couplet" with a unitary meaning).

3. The court of appeals' further conclusion that RICO's *other* remedy provisions support restricting the scope of § 1964(a) also conflicts with this Court's decisions. Pet.App.139-40. This Court rejected the same argument in *Porter*. 328 U.S. at 401-02. As with the statute at issue there, in enacting RICO Congress sought to give the government *multiple* tools to

achieve the statute's goals. *See* S. Rep. No. 617, at 79 (recognizing broad availability of criminal and civil remedies); *see also id.* at 80 (explaining that the criminal law is "a relatively ineffectual tool" to implement RICO's goals); *accord Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) ("Congress may impose both a criminal and a civil sanction in respect to the same act or omission").[6]

The many conflicts with these precedents also warrant review.

CONCLUSION

This Court should grant review and restore to the district court the authority Congress granted in RICO § 1964(a). With its authority properly restored,

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[6] The court of appeals' reliance on *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996) – which concerned whether a *private* party could utilize the injunction provision of a statute for the treatment and storage of hazardous waste to recover the costs of a *prior* waste cleanup – was also misplaced. Pet.App.136-38. Because the provision at issue only addressed "*imminent*" dangers, and Congress had passed another statute specifically aimed at *past* clean-up issues, the Court unsurprisingly concluded that the injunctive provision in the former statute did not authorize a *private* cost-recovery claim. 516 U.S. at 484-86. The Court also noted that since participation by the United States precluded *any* private use of the injunctive provision, *see* 42 U.S.C. § 6972(b)(2)(B), the petitioner's interpretation would lead to an absurd result whereby cost recovery would be available only in cases so insubstantial that the government declined to get involved. 516 U.S. at 486-87.

the district court can bring full force to its formidable findings, and consider in the first instance which of the remedies advanced by the United States and the Public Health Advocates will most appropriately redress the tobacco companies' far-reaching misconduct in this extremely unique case.

For the foregoing reasons, petitioners respectfully request that the Court grant their petition for a writ of certiorari.

Respectfully submitted,

HOWARD M. CRYSTAL
Counsel of Record
KATHERINE A. MEYER
MEYER GLITZENSTEIN
& CRYSTAL
1601 Connecticut Ave., N.W.,
Suite 700
Washington, D.C. 20009
(202) 588-5206
hcrystal@meyerglitz.com

Counsel for Petitioners

Of counsel:
PROFESSOR G. ROBERT BLAKEY
William J. and Dorothy K. O'Neill
Professor of Law
NOTRE DAME LAW SCHOOL*
Notre Dame, Indiana 46556
(574) 631-5717
*for identification only

566 F.3d 1095

United States Court of Appeals,
District of Columbia Circuit.
UNITED STATES of America, United States Department of Justice, et al., Appellees
v.
PHILIP MORRIS USA Inc., Formerly Known as Philip Morris Incorporated, et al., Appellees
British American Tobacco (Investments) Ltd., Directly and as Successor to British-American Tobacco Company, Ltd., Appellant
The Council for Tobacco Research-USA, Inc., et al., Appellees.
Nos. 06-5267, 06-5268.

Argued Oct. 14, 2008.
Decided May 22, 2009.

Appeals from the United States District Court for the District of Columbia (No. 99cv02496). Michael A. Carvin and Miguel A. Estrada argued the causes for appellants. With them on the briefs were David S. Eggert, Guy Miller Struve, Charles S. Duggan, David M. Bernick, Robert F. McDermott, Jr., Peter J. Biersteker, Michael S. Fried, John K. Crisham, Michael B. Minton, Bruce D. Ryder, Bruce G. Sheffler, Alan E. Untereiner, Joseph Kresse, and Deborah Israel. Murray R. Garnick, Timothy M. Broas, James A. Goold, Gene E. Voigts, Clausen Ely Jr., Leonard A. Feiwus, James W. Newbold, Edward C. Schmidt, Arnon D. Siegel, Keith A. Teel, Theodore V. Wells, Jr., and Dan K. Webb entered appearances.

Alan E. Untereiner and Bruce G. Sheffler were on the briefs for appellant British American Tobacco (Investments) Limited.

David S. Eggert, Guy Miller Struve, and Charles S. Duggan were on the briefs for appellant Altria Group, Inc.

Daniel J. Popeo, Paul D. Kamenar, Andrew G. McBride, and Thomas R. McCarthy were on the brief for amici curiae National Association of Manufacturers and the Washington Legal Foundation urging reversal.

Scott A. Sinder was on the brief for amicus curiae National Association of Convenience Stores in support of appellants.

Robin S. Conrad, Amar D. Sarwal, Theodore B. Olson, and Matthew D. McGill were on the brief for amicus curiae Chamber of Commerce of the United States of America in support of appellants urging reversal.

Mark B. Stern, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were Michael F. Hertz, Deputy Assistant Attorney General, Jonathan F. Cohn, Deputy Assistant Attorney General, and Alisa B. Klein, Mark R. Freeman, Sarang Vijay Damle, Melissa N. Patterson, and Christopher J. Walker, Attorneys.

Howard M. Crystal argued the cause for intervenors Tobacco-Free Kids Action Fund, et al. With him on the briefs were Katherine A. Meyer and G. Robert Blakey.

Michael D. Hausfeld and Victoria S. Nugent were on the brief for amici curiae American College of Occupational and Environmental Medicine, et al. in support of appellee urging affirmance.

William C. Lieblich, Talis J. Colberg, Attorney General, Attorney General's Office of the State of Alaska, Terry Goddard, Attorney General, Attorney General's Office of the State of Arizona, Dustin McDaniel, Attorney General, Attorney General's Office of the State of Arkansas, Edmund G. Brown, Jr., Attorney General, Attorney General's Office of the State of California, Richard Blumenthal, Attorney General, Attorney General's Office of the State of Connecticut, Joseph R. "Beau" Biden III, Attorney General, Attorney General's Office of the State of Delaware, Bill McCollum, Attorney General, Attorney General's Office of the State of Florida, Mark J. Bennett, Attorney General, Attorney General's Office of the State of Hawaii, Lawrence Wasden, Attorney General, Attorney General's Office of the State of Idaho, Lisa Madigan, Attorney General, Attorney General's Office of the State of Illinois, Paul Morrison, Attorney General, Attorney General's Office of the State of Kansas, Greg Stumbo, Attorney General, Attorney General's Office of the State of Kentucky, Charles Foti, Jr., Attorney General, Attorney General's Office of the State of Louisiana, G. Steven Rowe, Attorney General, Attorney General's Office of the State of Maine, Douglas F. Gansler, Attorney General, Attorney General's Office of the State of Maryland, Martha Coakley, Attorney General, Attorney General's Office

of the Commonwealth of Massachusetts, Michael A. Cox, Attorney General, Attorney General's Office of the State of Michigan, Lori Swanson, Attorney General, Attorney General's Office of the State of Minnesota, Jim Hood, Attorney General, Attorney General's Office of the State of Mississippi, Jeremiah W. (Jay) Nixon, Attorney General, Attorney General's Office of the State of Missouri, Mike McGrath, Attorney General, Attorney General's Office of the State of Montana, Catherine Cortez Masto, Attorney General, Attorney General's Office of the State of Nevada, Kelly A. Ayotte, Attorney General, Attorney General's Office of the State of New Hampshire, Anne Milgram, Attorney General, Attorney General's Office of the State of New Jersey, Gary King, Attorney General, Attorney General's Office of the State of New Mexico, Andrew M. Cuomo, Attorney General, Attorney General's Office of the State of New York, Marc Dann, Attorney General, Attorney General's Office of the State of Ohio, W.A. Drew Edmondson, Attorney General, Attorney General's Office of the State of Oklahoma, Hardy Myers, Attorney General, Attorney General's Office of the State of Oregon, and Tom Corbett, Attorney General, Attorney General's Office of the Commonwealth of Pennsylvania, Patrick C. Lynch, Attorney General, Attorney General's Office of the State of Rhode Island, Robert E. Cooper, Jr., Attorney General, Attorney General's Office of the State of Tennessee, William H. Sorrell, Attorney General, Attorney General's Office of the State of Vermont, Robert M. McKenna, Attorney General, Attorney General's Office of the State of Washington,

Darrell V. McGraw, Attorney General, Attorney General's Office of the State of West Virginia, Bruce A. Salzburg, Attorney General, Attorney General's Office of the State of Wyoming, and Vincent F. Frazer, Attorney General, Attorney General's Office of the Territory of the United States Virgin Islands, were on the brief for amici curiae States in support of appellee.

Allison M. Zieve and Brian Wolfman were on the brief for amici curiae Public Citizen, Inc., et al. in support of appellee urging affirmance.

Christopher N. Banthin and Stephen M. Kohn were on the brief for amici curiae American Medical Association and Others in support of appellee.

David C. Vladeck was on the brief for amicus curiae Tobacco Control Legal Consortium in support of appellee urging affirmance.

Harvey Kurzweil and Alexander M. Kayne were on the brief of amicus curiae the Citizens' Commission to Protect the Truth in support of appellee and supporting partial reversal.

Kerry S. Lane, appearing pro se, was on the brief as amicus curiae.

Before: SENTELLE, Chief Judge, TATEL and BROWN, Circuit Judges.

Opinion for the Court filed PER CURIAM.

PER CURIAM:

Defendants in this action, cigarette manufacturers and trade organizations, appeal from the district court's judgment finding them liable for conducting the affairs of their joint enterprise through a pattern of mail and wire fraud in a scheme to deceive American consumers. They also appeal from the district court's remedial order, which imposes numerous negative and affirmative duties on Defendants. The government and intervenors cross-appeal from the district court's denial of additional requested remedies. After considering all of the parties' arguments, we affirm in large part the finding of liability, remanding only for dismissal of the trade organizations. We also largely affirm the remedial order, including the denial of additional remedies, but vacate the order with regard to four discrete issues, remanding for further proceedings as directed in this opinion.

I. Background

The United States initiated this civil action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, in 1999. The government alleged that nine cigarette manufacturers and two tobacco-related trade organizations violated section 1962(c) and (d) of the Act. Those subsections make it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or

foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity" or to conspire to do so. 18 U.S.C. § 1962(c), (d). The eleven Defendants were Philip Morris, Inc., now Philip Morris USA, Inc. ("Philip Morris"); R.J. Reynolds Tobacco Company, now Reynolds American ("Reynolds"); Brown & Williamson Tobacco Company, now part of Reynolds ("Brown & Williamson"); Lorillard Tobacco Company ("Lorillard"); The Liggett Group, Inc. ("Liggett"); American Tobacco Company, which merged with Brown & Williamson and is now part of Reynolds ("American"); Philip Morris Companies, now Altria ("Altria"); British American Tobacco (Investments) Ltd. ("BATCo"); B.A.T. Industries p.l.c., now part of BATCo ("BAT Industries"); The Council for Tobacco Research-USA, Inc. ("CTR"); and The Tobacco Institute, Inc. ("TI"). The last two entities are trade organizations the cigarette manufacturers created; they do not manufacture or sell tobacco products. The district court dismissed BAT Industries from the case for lack of personal jurisdiction.

The government alleged that Defendants violated and continued to violate RICO by joining together in a decades-long conspiracy to deceive the American public about the health effects and addictiveness of smoking cigarettes. Specifically, the government alleged that Defendants fraudulently denied that smoking causes cancer and emphysema, that secondhand smoke causes lung cancer and endangers

children's respiratory and auditory systems, that nicotine is an addictive drug and Defendants manipulated it to sustain addiction, that light and low tar cigarettes are not less harmful than full flavor cigarettes, and that Defendants intentionally marketed to youth. *United States v. Philip Morris USA, Inc.*, 449 F.Supp.2d 1, 27 (D.D.C.2006). In addition, the government alleged that Defendants concealed evidence and destroyed documents to hide the dangers of smoking and protect themselves in litigation. *Id.* The government identified 148 racketeering acts of mail and wire fraud Defendants allegedly committed in furtherance of their scheme. Although the district court did not allow the government to prove 650 additional racketeering acts due to their late disclosure, the court did permit the government to introduce evidence supporting those acts to prove other RICO elements, such as the continuity and pattern of racketeering activity, the RICO enterprise and conspiracy, and Defendants' participation in the enterprise.

After years of pretrial proceedings and discovery, the case went to trial in September 2004. The bench trial lasted nine months and included live testimony from 84 witnesses, written testimony from 162 witnesses, and almost 14,000 exhibits in evidence. The government presented evidence that the presidents of Philip Morris, Reynolds, Brown & Williamson, Lorillard, and American assembled together in 1953 to strategize a response to growing public concern about the health risks of smoking and jointly retained

a public relations firm to assist in the endeavor. *Id.* at 37. From the beginning they agreed that no cigarette manufacturer would "seek a competitive advantage by inferring to its public that *its* product is less risky than others"; they would make no "claims that special filters or toasting, or expert selection of tobacco, or extra length in the butt, or anything else, makes a given brand less likely to cause you-know-what." *Id.* (quoting public relations firm's Planning Committee Memorandum). Acting on this agreement, the cigarette manufacturers jointly issued "A Frank Statement to Cigarette Smokers," published as a full-page advertisement in newspapers across the country on January 4, 1954. *Id.* at 39. "The Frank Statement set forth the industry's 'open question' position that it would maintain for more than forty years – that cigarette smoking was not a proven cause of lung cancer; that cigarettes were not injurious to health; and that more research on smoking and health issues was needed." *Id.* All of the Defendant manufacturers eventually joined this collective effort.

The government presented evidence from the 1950s and continuing through the following decades demonstrating that the Defendant manufacturers were aware – increasingly so as they conducted more research – that smoking causes disease, including lung cancer. Evidence at trial revealed that at the same time Defendants were disseminating advertisements, publications, and public statements denying any adverse health effects of smoking and promoting their "open question" strategy of sowing doubt, they

internally acknowledged as fact that smoking causes disease and other health hazards. *Id.* at 146, 164, 168-69. Although the manufacturers conducted their own research and public relations regarding health and other issues, they also relied in part on a series of jointly-created entities. Among these entities were Defendants TI and CTR (formerly the Tobacco Industry Research Committee). The Defendant manufacturers created TI and CTR, composed their membership, staffed their boards of directors with executives from the manufacturers, and maintained frequent communication between high-level manufacturer and joint-entity officials. *Id.* at 43-44, 63. Evidence at trial showed that TI and CTR conducted the manufacturers' joint public relations through false and misleading press releases and publications, trained representatives from the manufacturers regarding their coordinated industry message, conducted some cigarette testing for the manufacturers, and funded "special projects" to produce favorable research results and witnesses specifically for use in litigation and for support of industry public statements. *Id.* at 66, 82, 86, 87, 91.

In addition to the health hazards of smoking, the government presented evidence that Defendants intimately understood the addictiveness of nicotine and manipulated nicotine delivery in cigarettes to create and sustain addiction. Evidence showed that Defendants undertook extensive research into the physiological impact of nicotine, how it operates within the human body, and how the physical and

chemical design parameters of cigarettes influence the delivery of nicotine to smokers. *Id.* at 208, 308-09. As a result of this research, they recognized and internally acknowledged that smoking and nicotine are addictive and they engineered their products around creating and sustaining this addiction. Evidence at trial suggested that despite this internal knowledge, for decades Defendants publicly denied and distorted the truth about the addictive nature of their products, suppressed research revealing the addictiveness of nicotine, and denied their efforts to control nicotine levels and delivery. *Id.* at 209, 309.

The government also presented evidence tending to show that Defendants marketed and promoted their low tar brands to smokers – who were concerned about the health hazards of smoking or considering quitting – as less harmful than full flavor cigarettes despite either lacking evidence to substantiate their claims or knowing them to be false. *Id.* at 430. Internal industry documents introduced at trial revealed that by the late 1960s and early 1970s, Defendants were aware that lower tar cigarettes are unlikely to provide health benefits because they do not actually deliver the low levels of tar and nicotine advertised. *Id.* at 430-31. Defendants researched and understood the phenomenon whereby smokers of low tar cigarettes, to satisfy their addiction, modify their smoking behavior to compensate for the reduced nicotine yields by "taking more frequent puffs, inhaling smoke more deeply, holding smoke in their lungs longer, covering cigarette ventilation holes with

fingers or lips, and/or smoking more cigarettes." *Id.* at 431. As a result of this nicotine-driven behavior, smokers of low tar cigarettes boost their intake of tar, so that lower tar cigarettes do not result in lower tar intake and therefore do not yield the touted health benefits or serve as a step toward quitting smoking. *Id.* Evidence at trial suggested that Defendants understood this concept – for some time, better than the public health community or government regulators – while they promoted lower tar cigarettes as "health reassurance" brands.

Regarding secondhand smoke, the government presented evidence suggesting that Defendants became aware that secondhand smoke poses a health risk to nonsmokers but made misleading public statements and advertisements about secondhand smoke in an attempt to cause the public to doubt the evidence of its harmfulness. *Id.* at 692. At trial, internal industry documents revealed that Defendants believed the public perception of secondhand smoke could determine the industry's survival and that secondhand smoke research by the cigarette manufacturers was a sensitive issue due to the absence of "objective science" supporting their position and the risk that their own research would lead to unfavorable results. *Id.* at 733. As a result, the manufacturers jointly created the Center for Indoor Air Research ("CIAR") to coordinate and fund their secondhand smoke research with the appearance of independence. *Id.* at 119, 735. The evidence also showed that they "created, controlled, used, or

participated in" a vast array of foreign or international entities to conduct their sensitive secondhand smoke research, generate "marketable science" to use for public relations purposes, and coordinate their shared objectives and message. *Id.* at 119-20, 759.

In addition to these topics, the government also presented evidence to the district court regarding Defendants' targeted marketing to youth under twenty-one years of age and their denials of such marketing, *id.* at 561, 672, as well as evidence concerning Defendants' employees and attorneys destroying documents relevant to their public and litigation positions and suppressing or concealing scientific research, *id.* at 801, 832.

During the trial, this court rendered a decision on Defendants' interlocutory appeal from the denial of summary judgment on the government's claim for a disgorgement remedy under RICO section 1964(a). We reversed the district court and held that disgorgement is not an available remedy in civil RICO cases. *United States v. Philip Morris USA, Inc.* ("*Disgorgement Opinion*"), 396 F.3d 1190 (D.C.Cir.2005). In response, the district court granted the government leave to reformulate its proposed remedies. After the liability phase of the trial, the district court held a fourteen-day remedies trial. At the close of the remedies phase, several organizations moved to intervene in the litigation to assert their interests in the proposed remedies. The district court granted the American Cancer Society, the American Heart Association,

the American Lung Association, Americans for Non-smokers' Rights, the National African American Tobacco Prevention Network, and the Tobacco-Free Kids Action Fund leave to intervene solely on the subject of remedies.

The district court entered final judgment against Defendants on August 17, 2006, finding that they maintained an illegal racketeering enterprise and each Defendant participated in the conduct, management, and operation of the enterprise in violation of section 1962(c), and that they explicitly and implicitly agreed to do so, in violation of section 1962(d). *Philip Morris*, 449 F.Supp.2d at 851, 901. The court found that Defendants engaged in a scheme to defraud smokers and potential smokers by (1) falsely denying the adverse health effects of smoking, *id.* at 854; (2) falsely denying that nicotine and smoking are addictive, *id.* at 856; (3) falsely denying that they manipulated cigarette design and composition so as to assure nicotine delivery levels that create and sustain addiction, *id.* at 858; (4) falsely representing that light and low tar cigarettes deliver less nicotine and tar and therefore present fewer health risks than full flavor cigarettes, *id.* at 859; (5) falsely denying that they market to youth, *id.* at 861; (6) falsely denying that secondhand smoke causes disease, *id.* at 864; and (7) suppressing documents, information, and research to prevent the public from learning the truth about these subjects and to avoid or limit liability in litigation, *id.* at 866. The court concluded that the government failed to prove that Defendants

deliberately chose not to utilize or market feasible designs or product features that could produce less hazardous cigarettes. *Id.* at 384.

Before granting injunctive relief against Defendants the district court assessed whether they presented a "reasonable likelihood of further violation(s) in the future." *Id.* at 909 (quoting *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1168 (D.C.Cir.1978)). The court concluded that Philip Morris, Reynolds, Brown & Williamson, Lorillard, American, Altria, and BATCo were reasonably likely to commit future RICO violations unless enjoined because they continued to make false and misleading statements at the time of trial, their businesses presented continuing opportunities to commit RICO violations, and their corporate leadership continued to consist of veteran employees with longstanding ties to the companies. *Id.* at 910-13. Defendants argued that no injunction was necessary because their Master Settlement Agreement with forty-six states and the District of Columbia and their individual settlements with four states already sufficiently restrained them. The district court rejected this argument, concluding that the Master Settlement Agreement did not obviate the need for injunctive relief because Defendants had not fully complied with the agreement, parts of the agreement began expiring in 2006, the states could not vigorously enforce all aspects of the agreement, and BATCo and Altria were not subject to the settlement agreement. *Id.* at 913-15.

The district court found that three Defendants – CTR, TI, and Liggett – did not present a reasonable likelihood of future RICO violations, therefore the court did not order injunctive remedies against them. CTR and TI, the court found, now exist solely for the limited purpose of winding up their activities and each retains only one adviser to support its litigation defense and handle any remaining administrative matters. *Id.* at 915-18. The court found that Liggett withdrew from the RICO conspiracy by admitting that smoking causes cancer and is addictive, by voluntarily restricting its advertising and including disclosures on its packages, and by cooperating with the United States and state attorneys general in their claims against other tobacco companies. *Id.* at 906-07, 918-19. The district court concluded that Liggett was not reasonably likely to commit future RICO violations based on this withdrawal, its continued independence from the other Defendants, and its limited opportunity for future violations by virtue of its discount cigarette market and lack of traditional consumer advertising. *Id.* at 918-19.

Pursuant to section 1964, the district court imposed injunctive remedies against the other seven manufacturer Defendants. Specifically, the court ordered Defendants (1) to refrain from any acts of racketeering relating to the manufacturing, marketing, promotion, health consequences, or sale of cigarettes in the United States; (2) not to participate in the management or control of CTR, TI, or CIAR, and not to reconstitute the form or function of those

entities; (3) to refrain from making any material false, misleading, or deceptive representation concerning cigarettes that is disseminated to the United States public; (4) to cease using any express or implied health message or health descriptor for any cigarette brand, such as light or low tar; (5) to make corrective disclosures about addiction, the adverse health effects of smoking and secondhand smoke, their manipulation of cigarette design and composition, and light and low tar cigarettes; (6) to create document depositories providing the government and the public access to all industry documents disclosed in litigation; and (7) to provide their disaggregated marketing data to the government according to the schedule on which they provide it to the Federal Trade Commission. *Id.* at 938-45. The court also limited the sale and transfer of Defendants' brands, product formulas, and businesses to entities that either are subject to the injunctive order or will sell the brand, use the formula, or conduct the business exclusively outside the United States. *Id.* at 945.

The district court denied the remainder of the government's requested injunctive relief, including its proposed national smoking cessation program, public education and counter-marketing campaign, and youth smoking reduction plan. *Id.* at 933-34, 936-37. The court also denied the government's requests that it appoint a monitor to investigate and restructure the Defendant companies, *id.* at 935, and that it order Defendants to make public all "health and safety risk

information" about their products in their own files, *id.* at 929.

All Defendants except Liggett appealed, raising numerous challenges to the finding of liability and the remedies imposed. The government and the intervenors filed a cross-appeal regarding the remedies that the district court denied. On Defendants' motion we stayed the remedial injunction pending appeal.

We review the district court's conclusions of law *de novo. SEC v. Wash. Inv. Network,* 475 F.3d 392, 399 (D.C.Cir.2007). To the extent it is not based on legal error, we review the district court's decision to issue an injunction for abuse of discretion. *Id.* We may not set aside the district court's findings of fact unless they are clearly erroneous, giving due regard to the court's opportunity to judge the witnesses' credibility. *Id.* (citing FED. R. CIV. P. 52(a)(6)). This standard applies even when the district court adopts a party's proposed findings verbatim. *Anderson v. City of Bessemer City,* 470 U.S. 564, 572, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

To establish RICO liability, the government had to prove the necessary elements of RICO itself – including the existence of an enterprise and a pattern of racketeering activity, 18 U.S.C. § 1962(c) – as well as the elements of the underlying conduct constituting the racketeering acts, here, numerous instances of mail and wire fraud under 18 U.S.C. §§ 1341 and 1343. Defendants challenge the district court's findings regarding both RICO and the underlying fraud,

as well as the remedies the court imposed. We address Defendants' challenges to RICO liability in Part II, their general challenges to fraud liability in Part III, their challenges to specific aspects of the fraudulent scheme and the liability of specific Defendants in Part IV, their challenges to the finding that they are likely to commit future violations and therefore should be enjoined in Part V, and their challenges to particular remedies the court imposed in Part VI.

II. Challenges to RICO Liability

A. RICO Enterprise

RICO makes it unlawful for "any person . . . associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Thus, in a section 1962(c) suit, the defendants are the "persons" who conduct the "enterprise's" affairs through racketeering activity. Because RICO defines "person" as including "any individual or entity capable of holding a legal or beneficial interest in property," *id.* § 1961(3), corporations as well as individuals can be liable if they conduct an enterprise's affairs through a pattern of racketeering activity. In language central to the issue before us, section 1961(4) states:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of

> individuals associated in fact although not a legal entity.

Id. § 1961(4). The enterprise as such generally faces no section 1962(c) RICO liability; indeed it may be the innocent vehicle through which unlawful activity is carried out, *see Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158, 164, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001) ("RICO both protects a legitimate 'enterprise' from those who would use unlawful acts to victimize it, and also protects the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed.'" (quoting *United States v. Turkette,* 452 U.S. 576, 591, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), and *Nat'l Org. for Women, Inc. v. Scheidler,* 510 U.S. 249, 259, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994))). When the enterprise is an association-in-fact, members of the association may be both part of the "enterprise" and liable as "persons" under RICO if they conduct the enterprise's affairs through racketeering activity. *See, e.g., United States v. Richardson,* 167 F.3d 621, 626 (D.C.Cir.1999) (upholding conviction of defendant member of association-in-fact enterprise).

Here, defining the RICO enterprise as "a group of business entities and individuals associated-in-fact, including Defendants to this action, their agents and employees, and other organizations and individuals," the district court held that the Defendant cigarette manufacturers and trade organizations had violated section 1962(c) by participating in the conduct of the

enterprise's affairs through multiple acts of mail and wire fraud. *Philip Morris,* 449 F.Supp.2d at 851, 867. Defendants challenge the district court's acceptance of a RICO enterprise made up of individuals and corporations, arguing that the statute provides an exclusive list of possible enterprises that covers groups of *individuals* associated in fact, not mixed groups of individuals *and corporations* associated in fact.

In *United States v. Perholtz,* 842 F.2d 343 (D.C.Cir.1988), however, we squarely rejected this precise argument. There, we held that a group of seven individuals and eleven corporations and partnerships associated in fact may constitute a RICO "enterprise." *Id.* at 351 n. 12, 353. We explained: "[RICO] defines 'enterprise' as *including* the various entities specified; the list of entities is not meant to be exhaustive." *Id.* at 353. As such, a group of individuals, corporations, and partnerships associated in fact can qualify as a RICO "enterprise," even though section 1961(4) nowhere expressly mentions this type of association.

In so holding, we joined several other circuits that had reached the same conclusion. *Perholtz,* 842 F.2d at 353 (citing the Second, Third, Seventh, and Eleventh Circuits, as well as Fifth Circuit Unit B). Indeed, both prior to and since *Perholtz,* every circuit to consider the question has likewise held that corporations may be part of an association-in-fact enterprise. *See United States v. London,* 66 F.3d 1227, 1243-44 (1st Cir.1995) (holding that corporations can

be part of an association-in-fact enterprise because section 1961(4)'s list is not exhaustive); *United States v. Huber,* 603 F.2d 387, 394 (2d Cir.1979) (same); *United States v. Aimone,* 715 F.2d 822, 828 (3d Cir.1983) (same); *United States v. Thevis,* 665 F.2d 616, 625-26 (5th Cir. Unit B 1982) (same), *superseded on other grounds by* FED.R.EVID. 804(b)(6) (1997); *United States v. Masters,* 924 F.2d 1362, 1366 (7th Cir.1991) (same); *Atlas Pile Driving Co. v. DiCon Fin. Co.,* 886 F.2d 986, 995 n. 7 (8th Cir.1989) (same); *see also Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio,* 900 F.2d 882, 887 (6th Cir.1990) (reaching same outcome and citing *Huber,* 603 F.2d at 393-94); *United States v. Navarro-Ordas,* 770 F.2d 959, 969 n. 19 (11th Cir.1985) (same); *United States v. Feldman,* 853 F.2d 648, 655-56 (9th Cir.1988) (reaching same outcome based on different statutory analysis); *United States v. Najjar,* 300 F.3d 466, 484 (4th Cir.2002) (upholding without discussion RICO convictions involving an association-in-fact enterprise that included corporations). The judges of these circuits are equally unanimous, for not one has dissented from the proposition that an association-in-fact enterprise may include corporations.

Defendants argue that *Perholtz* has no applicability where, as here, the *defendants* are corporations. Because the *Perholtz* defendants were individual members of the enterprise, not its corporate members, Defendants here claim that *Perholtz* applies only when individuals, not corporations, are the RICO defendants. As Defendants see it, *Perholtz*

merely ensures that individuals are unable to escape liability simply by including corporations in their enterprise; *Perholtz,* they argue, does not mean that the associated-in-fact corporations can themselves incur RICO liability.

But nothing in *Perholtz* is so limited. Quoting the Supreme Court's statement in *United States v. Turkette* that "[t]here is no restriction upon the associations embraced by the definition [of enterprise]," 452 U.S. at 580, 101 S.Ct. 2524, *Perholtz* sets forth its holding in broad terms: "We therefore follow those courts that have held that individuals, corporations, and other entities may constitute an association-in-fact," 842 F.2d at 353. Nowhere does *Perholtz* suggest that the rule varies depending on the identity of the defendants. Indeed, two of the cases *Perholtz* relies on involved corporate defendants. *Id.* (citing *Thevis,* 665 F.2d at 625-26 (upholding RICO convictions for one individual and one corporate defendant), and *Bunker Ramo Corp. v. United Bus. Forms, Inc.,* 713 F.2d 1272, 1285 (7th Cir.1983) (upholding RICO charges against one individual and one corporation)). Many other decisions have similarly upheld RICO allegations involving corporate defendants who were also members of the association-in-fact enterprise. *See, e.g., City of N.Y. v. Smokes-Spirits.com, Inc.,* 541 F.3d 425, 450-51 (2d Cir.2008); *Odom v. Microsoft Corp.,* 486 F.3d 541, 553 (9th Cir.2007); *Najjar,* 300 F.3d at 484; *United States v. Goldin Indus., Inc.,* 219 F.3d 1271, 1274 (11th Cir.2000); *Dana Corp.,* 900 F.2d at 887; *Shearin v. E.F. Hutton Group, Inc.,* 885 F.2d

1162, 1165-66 (3d Cir.1989), *overruled on other grounds by Beck v. Prupis*, 529 U.S. 494, 506, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000); *Atlas Pile Driving*, 886 F.2d at 995; *Ocean Energy II, Inc. v. Alexander & Alexander Inc.*, 868 F.2d 740, 748-49 (5th Cir.1989).

Moreover, Defendants' proposed limitation on *Perholtz* is contrary to the statute's language. As "persons" under section 1961(3), corporations may be RICO defendants regardless of the kind of enterprise charged. *See* 18 U.S.C. § 1962(c) ("It shall be unlawful for *any* person . . . associated with *any* enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." (emphases added)). Defendants cite not a single case lending even a shred of support to the idea that the meaning of "enterprise" can fluctuate depending on whom the government or the plaintiff chooses to name as the defendant. *Perholtz*'s interpretation of section 1961(4) thus applies regardless of whether the RICO defendants are individual "persons" or corporate "persons." To hold otherwise would require us to rewrite section 1962(c).

In a further attempt to evade *Perholtz*, Defendants argue that even if *Perholtz* was correct when decided, it has been eroded by the Supreme Court's 2001 decision in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001). Defendants' argument begins with the premise that at the time we decided *Perholtz*, RICO

presented a potential loophole: because the RICO defendant must be distinct from the RICO enterprise, *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639,* 839 F.2d 782, 790 (D.C.Cir.1988) ("[O]ne entity may not serve as the enterprise and the person associated with it. . . ."), *vacated on other grounds,* 492 U.S. 914, 109 S.Ct. 3235, 106 L.Ed.2d 583 (1989), a sole shareholder who used his alter-ego corporation for racketeering might evade RICO liability because he wouldn't be sufficiently distinct from the alter-ego corporation "enterprise." Defendants rely on *Perholtz*'s suggestion that a definition of "enterprise" that excluded associations-in-fact of corporations would lead to "the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO." 842 F.2d at 353. According to Defendants, we were motivated in *Perholtz* by the underlying concern "that a criminal defendant conducting the affairs of an 'enterprise' that was his own closely held corporation, would be so closely tied to the enterprise that he would escape RICO liability." Defs. Br. 37. Given that the Supreme Court has subsequently eliminated this concern – holding in *Cedric Kushner* that an individual sole shareholder *is* sufficiently distinct from his alter-ego corporation to sustain RICO liability, 533 U.S. at 160, 121 S.Ct. 2087 – Defendants assert that *Perholtz* no longer represents binding authority.

We do not read *Perholtz* as motivated by the concerns addressed in *Cedric Kushner.* In contrast to *Cedric Kushner,* the enterprise in *Perholtz* involved

multiple individuals and numerous corporations, with no indication that the corporations were either all closely held by the individual defendants or in any other way insufficiently distinct. 842 F.2d at 351 n. 12. Indeed, at least some of the *Perholtz* corporate enterprise members were not closely held. For example, enterprise member International Business Services, Inc. (IBS) existed in its own right prior to the scheme and was related to the defendants through employment relationships that would not have defeated RICO's distinctness requirement: Perholtz himself was a consultant to IBS, and the other RICO defendant, Franklin Jackson, was an IBS project manager. *Id.* at 348. Similarly, enterprise member Remote Computer Services Corporation, although formed expressly for the purpose of the scheme, was jointly held in equal shares by three individuals – Perholtz and two other individual members of the enterprise, *id.* at 350 – and thus would have been sufficiently distinct from each of those non-sole shareholders. The enterprise also included two separate real estate companies both of which apparently existed independently of the scheme and were not otherwise affiliated with the individuals. *Id.* at 351 n. 12. At least one individual enterprise member, John Gentile, worked for the Postal Service and apparently had no formal stake in the corporate enterprise members. *Id.* at 346, 351 n. 12. In *Perholtz*, we held that all these corporations – not just those closely held or created solely for the scheme – could be part of an association-in-fact enterprise. Indeed, only *after* so holding did we turn to

Perholtz's entirely separate argument that he, as an individual, was insufficiently distinct from the enterprise. Far from basing our holding on this argument, we simply noted that we had "no occasion to consider the separateness requirement" because Perholtz associated not with himself but with others. *Id.* at 353.

Given the structure of the *Perholtz* enterprise and the court's acknowledgement that distinctness was not at issue, we think *Perholtz* reflected a different concern, namely that a group of sophisticated racketeers who would otherwise constitute an association-in-fact might evade RICO's grasp by virtue of their ability to operate through corporations and establish complex networks of companies, kickbacks, and contracts to achieve their illicit ends. Indeed, immediately following its reference to "corporate shells," *Perholtz* emphasized Congress's desire that RICO serve "as a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless." *Id. Perholtz* itself presented just such a situation: the defendants worked through their own companies and multiple outside corporations in an intricate web of shared commissions to game the bidding process for government contracts. The success of the scheme required the participation of companies to serve as contractors and subcontractors. "This relationship of individuals and corporations is precisely what section 1962(c) was designed to attack." *Id.* at 354.

Moreover, in asserting their *Cedric Kushner* argument, Defendants fail to explain how *Perholtz*'s interpretation would even solve the hypothetical problem they posit. According to Defendants, in order to preserve RICO liability for a sole shareholder who would be insufficiently distinct from his alter-ego corporation, the *Perholtz* court held that an "individual and his shell corporation could *together* . . . constitute an association-in-fact enterprise." Defs. Reply Br. 16. In Defendants' view, the sole shareholder would then be liable under RICO for conducting the affairs of this association-in-fact enterprise. Yet if an individual is insufficiently distinct from his alter-ego corporation, we seriously doubt he would suddenly be sufficiently distinct from an enterprise consisting of his alter-ego corporation *and himself*. If *Perholtz* had been concerned with distinctness, its purported "solution" would make little sense.

Further seeking to justify their reliance on *Cedric Kushner*, Defendants say that the government cites only one post-*Cedric Kushner* case – *United States v. Najjar*, 300 F.3d 466 (4th Cir.2002) – that upheld an association-in-fact enterprise of corporations. The relevance of this is hard to grasp, as other post-*Cedric Kushner* cases *not* cited by the government accept association-in-fact enterprises comprised of corporations. *See Smokes-Spirits.com*, 541 F.3d at 450-51 (holding that the plaintiff adequately pleaded an association-in-fact enterprise consisting of two corporations); *Odom*, 486 F.3d at 553 (holding that plaintiffs had sufficiently alleged an association-in-

fact enterprise of two corporations); *United States v. Cianci*, 378 F.3d 71, 83 (1st Cir.2004) ("It is uncontroversial that corporate entities, including municipal and county ones, can be included within association-in-fact RICO enterprises."); *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir.2005) ("[T]here is no question that DuPont [corporation] and the law firms together can constitute an 'associated in fact' RICO enterprise."). And as we noted above, no circuit has ever held the opposite.

Cedric Kushner thus undermines neither the unanimous judicial view that association-in-fact enterprises may include corporations nor *Perholtz*'s binding effect on this case. Defendants' argument that we should read section 1961(4) as an exhaustive list of possible RICO enterprises is therefore unavailing. Not only is it foreclosed by *Perholtz*, it is unpersuasive on its own terms. As *Perholtz* and many other circuits explain, the use of the word "includes" indicates that RICO's list of "enterprises" is non-exhaustive. Indeed, section 1961 makes the non-exhaustive nature of "includes" clear by alternating between the words "means" and "includes" to introduce the section's various definitions. Specifically, five of section 1961's ten subsections introduce definitions with the word "means." For example, section 1961(1) defines "racketeering activity," explaining that the term "means" any of a list of specific state and federal crimes. Section 1961(2) likewise introduces a definitional list with the term "means": "'State' means any State of the United States, the District of Columbia,

the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof." 18 U.S.C. § 1961(2); *see also id.* § 1961(6), (7), (8) (introducing definitions of "unlawful debt," "racketeering investigator," and "racketeering investigation" with the term "means"). Section 1961(4), by contrast, says "'enterprise' *includes* any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4) (emphasis added). By switching between "means" and "includes" in the same definitional provision, Congress signaled its intent to distinguish between exhaustive and non-exhaustive lists. *See Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 n. 1, 55 S.Ct. 60, 79 L.Ed. 232 (1934) (describing a statute that introduced three definitions with the word "includes" and seven definitions with the word "means" and noting that "[t]he natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition").

That Congress provided an exhaustive list of *legal* entity enterprises by adding the phrase "or other legal entity" hardly converts the list of *non*-legal entity enterprises into an exhaustive list. Had Congress wanted to limit non-legal entity associations to those expressly listed, the most obvious way

to do so would have been the way Congress wrote the five clearly exhaustive definitions in the same section: it could have said "'enterprise' *means* any individual, partnership, corporation, association, or other legal entity, or any union or group of individuals associated in fact although not a legal entity." But Congress chose to say "'enterprise' *includes*" the listed entities. Defendants think that the phrase "or other legal entity" would have been unnecessary if the list were otherwise non-exhaustive. Not so. Adding "or other legal entity" serves to *ensure* that all legal entities are covered while retaining the *possibility* that some additional non-legal entities beyond those listed are also covered.

Nor does the use of the phrase "including, but not limited to" to indicate a non-exhaustive list in a different section of RICO, section 1964(a), demonstrate that the sole word "includes" in section 1961(4) must introduce an exhaustive list. Section 1964, which establishes civil remedies for RICO violations, lacks section 1961's juxtaposition of the non-exhaustive term "includes" with the exhaustive term "means"; adding "but not limited to" helps to emphasize the non-exhaustive nature of section 1964(a)' s list of remedies. Section 1961 needed no such clarification because it employed the contrasting terms "means" and "includes" to distinguish exhaustive from non-exhaustive definitions.

Contrary to Defendants' argument, nothing about this interpretation renders the definition of "enterprise" devoid of meaning. Although encompassing

non-enumerated enterprises, section 1961(4)'s list defines "enterprise," in part, by listing the *kinds* of entities Congress had in mind. Indeed, the Supreme Court has acknowledged this meaning by requiring enterprises to exhibit common purpose, organization, and continuity. *Turkette,* 452 U.S. at 583, 101 S.Ct. 2524; *see also Richardson,* 167 F.3d at 625.

In sum, as *Perholtz* clearly holds, because RICO's "list of entities is not meant to be exhaustive," "individuals, corporations, and other entities may constitute an association-in-fact." 842 F.2d at 353. This binding precedent – confirmed by the statute's language, buttressed by the unanimity among our sister circuits, and undiminished by Defendants' efforts to escape it – requires that we affirm the district court's holding that the government properly alleged a RICO enterprise of individuals, cigarette manufacturers, and trade organizations.

We also reject Defendants' additional challenges to the district court's findings regarding the existence of a RICO enterprise and their participation in its affairs. The district court found – permissibly in our view – that the enterprise had the common purpose of obtaining cigarette proceeds by defrauding existing and potential smokers, *Philip Morris,* 449 F.Supp.2d at 869; possessed the requisite structure both through informal association and through the formation of several formal organizations, *id.* at 870-71; functioned as a continuous unit despite personnel changes, *id.* at 871-72; and constituted a separate entity distinct from each Defendant, *id.* at 875. Defendants give us

neither any basis for concluding that the district court's factual findings were clearly erroneous nor any reason to think them legally insufficient. The district court also found – again permissibly – that despite competing in some aspects of their business, Defendants jointly committed fraud and so participated in the conduct of not just their own affairs but the enterprise's as well, *id.* at 875-78, and also that they conspired to do so, *id.* at 903-05. Accordingly, we affirm the district court's findings that an enterprise existed and that Defendants participated in the conduct of its affairs and conspired to do so.

B. Identifying Racketeering Acts

Defendants complain that the district court failed to identify the racketeering acts that support the finding of liability. While it is true the district court's opinion provided no single, discrete list of specific racketeering acts, the comprehensive findings – detailing over one-hundred racketeering acts – are sufficient to warrant affirmance. Defendants raise numerous challenges to the *correctness* of the district court's findings that they committed racketeering acts, which we take up in Parts III and IV. In this section, however, we are concerned only with the *existence* of these findings, not their validity.

By statutory definition, any violation of the mail or wire fraud statutes can qualify as "racketeering activity." 18 U.S.C. § 1961(1). To prove a violation of the mail and wire fraud statutes, the government

must show (1) a scheme or artifice to defraud and (2) a mailing or wire transmission in furtherance thereof. *Id.* §§ 1341, 1343. "Where one scheme involves several mailings, the law is settled that each mailing constitutes a violation of the statute." *Hanrahan v. United States,* 348 F.2d 363, 366 (D.C.Cir.1965). Where, as here, the mail and wire fraud statutes serve as the predicate offenses for a RICO violation, each racketeering act must be a mailing or wire transmission made in furtherance of a "scheme or artifice to defraud." 18 U.S.C. §§ 1341, 1343. Thus, in order to identify the racketeering acts, the district court must first have found a scheme to defraud, then concluded the alleged mailings or wire transmissions were in furtherance of such scheme. *See Philip Morris,* 449 F.Supp.2d at 852-54.

Although Defendants question whether the district court clearly found a scheme to defraud, the finding on this question is explicit: "The Government has proven that the Enterprise knowingly and intentionally engaged in a scheme to defraud smokers and potential smokers, for purposes of financial gain, by making false and fraudulent statements, representations, and promises." *Id.* at 852. The district court explains, in great detail, the seven components of the scheme to defraud. *Id.* at 852-67.

The court also held that "each of the alleged mailings and wire transmissions was in furtherance of the overarching scheme to defraud." *Id.* at 881. Thus it follows that any mailing or wire transmission found to have been made was found to have been a

mail or wire fraud offense and therefore a racketeering act.

Seventy-nine of the alleged acts were established by Defendants' own stipulations and admissions. *Id.* at 882 (enumerating 79 racketeering acts). Altogether, the court enumerated 108 racketeering acts in the opinion, as well as six others which it excluded on First Amendment grounds. *See id.* at 882, 884, 885 n. 62, 887. This total does not include the many other findings which may be tied to other racketeering acts, but for which the district court did not provide a specific list. *See, e.g., id.* at 883 ("[I]t is clear beyond any question that Defendants caused the mailings and wire transmissions underlying the 30 Racketeering Acts involving the news media's dissemination of Defendants' press releases and advertisements to their subscribers.").

The RICO statute requires "a pattern of racketeering activity" on the part of each defendant. 18 U.S.C. § 1962(c). "[A]t least two acts of racketeering activity" are necessary to form a pattern. *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (quoting 18 U.S.C. § 1961(5)). The district court found the requisite pattern committed by each Defendant, *Philip Morris*, 449 F.Supp.2d at 889-91, and this finding is not erroneous. A brief sampling of the 108 enumerated racketeering acts makes the point: Philip Morris, Reynolds, Brown & Williamson, Lorillard, American, and TI committed racketeering acts 24, 132, and 133 by mailing press releases containing false statements

about the addictiveness and health consequences of smoking. *Id.* at 194, 282-83. Philip Morris, Reynolds, Brown & Williamson, Lorillard, American, Liggett, and CTR committed racketeering acts 66, 73, and 88 by mailing letters regarding funding of CTR's "special projects" to create data supporting their fraudulent claims. *Id.* at 101, 882, 972, 976. BATCo and Brown & Williamson committed racketeering acts 30, 50, 51, 53, and 63 through their mailings to each other concerning the enterprise's position on the health effects and addictiveness of smoking as well as smoker compensation and nicotine. *Id.* at 253-54, 301, 882, 965, 969. Altria committed racketeering acts 71, 72, 74, and 75 in its efforts to coordinate Defendants' public positions and fund CTR research projects to support their fraudulent claims. *Id.* at 295, 813, 884, 974. As these examples demonstrate, the district court found each Defendant engaged in a "pattern of racketeering activity," and that finding is not erroneous. *See infra* Parts III, IV.

The 108 enumerated acts give us ample basis to review the district court's finding. Although the district court may have concluded other racketeering acts were proven as well, we need look no further. Defendants correctly argue we must ensure the remedy imposed is tailored to "the violation found," *United States v. Microsoft,* 253 F.3d 34, 105 (D.C.Cir.2001); the voluminous findings detailing the contours of the scheme to defraud are more than sufficient to allow this review, *see, e.g., Philip Morris,* 449 F.Supp.2d at 852-67. Given that a mailing or wire

transmission need not itself be fraudulent, the remedy needs to be tailored to the scheme to defraud, not the specific use of the mail or wires.

For similar reasons, we need not resolve Defendants' challenges to the racketeering acts involving denials of marketing to youth. As the district court imposed no remedies specifically relating to youth marketing, our assessment whether the remedies are tailored to the violation found is unaffected by the associated racketeering acts. The remaining racketeering acts are fully sufficient to support the district court's finding of a pattern of racketeering activity as to each Defendant. Because these challenges have no impact on the outcome of this appeal, we decline to address them. The district court set forth findings sufficient to allow our review of its verdict of liability and imposition of sanction.

III. General Challenges to Fraud Liability

A. Specific Intent

The predicate acts of racketeering in this case were all acts of mail or wire fraud, which require specific intent to defraud. *Post v. United States,* 407 F.2d 319, 329 (D.C.Cir.1968). Defendants challenge the district court's conclusion that they acted with specific intent, arguing that the district court applied an impermissible "collective intent" standard and that the government did not present any evidence to support a finding of specific intent under the correct formulation.

Corporations may be held liable for specific intent offenses based on the "knowledge and intent" of their employees. *N.Y. Cent. & Hudson River R.R. Co. v. United States,* 212 U.S. 481, 495, 29 S.Ct. 304, 53 L.Ed. 613 (1909); *see United States v. A & P Trucking Co.,* 358 U.S. 121, 125, 79 S.Ct. 203, 3 L.Ed.2d 165 (1958). Because a corporation only acts and wills by virtue of its employees, the proscribed corporate intent depends on the wrongful intent of specific employees. *See Saba v. Compagnie Nationale Air France,* 78 F.3d 664, 670 (D.C.Cir.1996). Thus, to determine whether a corporation made a false or misleading statement with specific intent to defraud, we look to the state of mind of the individual corporate officers and employees who made, ordered, or approved the statement. *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.,* 365 F.3d 353, 366 (5th Cir.2004).

A person's state of mind is rarely susceptible of proof by direct evidence, so specific intent to defraud may be, and most often is, inferred from the totality of the circumstances, including indirect and circumstantial evidence. *United States v. Alston,* 609 F.2d 531, 538 (D.C.Cir.1979); *United States v. Reid,* 533 F.2d 1255, 1264 (D.C.Cir.1976). We refer to this inference when, in the common law fraud context, we say that the factfinder "is permitted to impute knowledge of the falsity of the statements to the accused, not as a matter of law but as a consequence of inferences reasonably drawn from the facts shown."

United States v. Avant, 275 F.2d 650, 653 (D.C.Cir.1960).

Here, the district court concluded that the chief executive officers and other highly placed officials in the Defendant corporations made or approved statements they knew to be false or misleading, evincing their specific intent to defraud consumers. In some instances, the court found by direct evidence that representatives of the Defendant companies "willfully stat[ed] something which they knew to be untrue." *Philip Morris,* 449 F.Supp.2d at 895. For example, the court found that, in a televised interview in 1971, Philip Morris President Joseph Cullman III denied that cigarettes posed a health hazard to pregnant women or their infants, "contradict[ing] the information Helmut Wakeham, Philip Morris's Vice President for Corporate Research and Development, had given him two years earlier." *Id.* at 193-94. In the main, however, the district court relied on indirect and circumstantial evidence indicating that the senior corporate officials knew that their public statements, and those that they approved for their corporations, were false or misleading.

> In the majority of instances, the authors of the fraudulent statements alleged as Racketeering Acts were executives, including high level scientists – CEOs, Vice Presidents, Heads of Research & Development, not entry level employees – at each of the Defendant companies who would reasonably be expected to have knowledge of the company's

> internal research, public positions, and long term strategies.

Id. at 897. The court reasoned:

> [I]t is absurd to believe that the highly-ranked representatives and agents of these corporations and entities had no knowledge that their public statements were false and fraudulent. The Findings of Fact are replete with examples of C.E.O.s, Vice-Presidents, and Directors of Research and Development, as well as the Defendants' lawyers, making statements which were inconsistent with the internal knowledge and practice of the corporation itself.

Id. at 853. The district court did not commit legal error by imputing to Defendants' executives knowledge of the falsity of their statements based on inferences reasonably drawn from the facts shown, and sufficient evidence supported these inferences.

The government presented decades of evidence that scientists within the Defendant corporations and outside scientists hired by the corporations and their joint entities were continually conducting research and reviewing the research of other scientists regarding cigarettes and health, addiction, nicotine and tar manipulation, and secondhand smoke. The evidence at trial demonstrated that the results of this research – essential to the core of Defendants' operations, including strategic planning, product development, and advertising – were well known, acknowledged, and accepted throughout the corporations.

These results established that cigarette smoking causes disease, that nicotine is addictive, that light cigarettes do not present lower health risks than regular cigarettes due to smoker compensation, and that secondhand smoke is hazardous to health. Dr. William Farone, a scientist who worked at Philip Morris for eighteen years and whom the district court found to be "impressive and credible as both a fact and expert witness," *id.* at 186, testified about the understanding within Philip Morris on the question of whether cigarette smoking is a cause of lung cancer and other diseases:

> There was widespread acceptance that smoking caused disease. I never talked with a scientist at Philip Morris who said that smoking doesn't cause disease. [This was based on the] compelling epidemiology such as that recounted in the Surgeon's [sic] General's reports, and our knowledge about the chemicals that were created by cigarettes and what was delivered to the smoker, hundreds of times per day on average.

Id. at 187 (quoting Farone testimony). When asked whether, in his discussions with Philip Morris executives, any of them challenged the validity of the scientific evidence that smoking causes disease, Farone answered,

> No. Their comments generally focused on how the company could or should respond, not to whether the scientific evidence was valid. Remember, a main reason why they hired me in 1976 was to help develop a less

> hazardous cigarette. It seemed to me at the time I was hired, and certainly was the case during my entire time there, that hiring me for that job was itself implicit recognition that the cigarettes that were out there being sold were causing disease.

Id. (quoting Farone testimony).

The Defendant corporations documented the results of the studies regarding disease, nicotine addiction, and smoker compensation in numerous memoranda and reports; the evidence at trial, including internal corporate documents, demonstrated that the executives crafted their corporate priorities and strategies in response to these findings. *See, e.g., id.* at 165, 180, 218, 219, 232, 240, 258-59, 270, 336, 720. Defendants' own documents also support the inference that Defendants' executives were aware that their public relations strategy of creating the impression of an "open question" about the link between smoking and disease did not square with their own knowledge about the established link between the two. For example, William Kloepfer, Vice President of Public Relations for the Tobacco Institute, wrote to Earle Clements, President of the Tobacco Institute, admitting that "[o]ur basic position in the cigarette controversy is subject to the charge, and may be subject to a finding, that we are making false or misleading statements to promote the sale of cigarettes." *Id.* at 855. Other documents demonstrate that Defendants' top officials were directly informed of negative research results. For example, in 1977

Philip Morris Assistant General Counsel Alexander Holtzman sent a "warning" to the company's President, Joseph Cullman, informing him that a research project jointly sponsored by a group of the Defendant companies had concluded that exposure to cigarette smoke causes emphysema. *Id.* at 183.

The government presented similar evidence regarding the other aspects of Defendants' scheme, such as addiction and nicotine. A few examples cannot adequately present the volumes of evidence underlying the district court's findings of fact, but the following provide a fair sample: A 1991 Reynolds Research and Development report acknowledged that "[w]e are basically in the nicotine business." *Id.* at 237. Dr. Farone testified that during his time at Philip Morris there was "widespread acceptance internally throughout the company – among executives, scientists, and marketing people" that nicotine was primarily responsible for addiction to smoking. *Id.* at 858. Indeed, the district court found that "internal documents and testimony from former company employees affirmed that within their corporate walls, Defendants openly recognized the addictiveness of cigarettes." *Id.* Regarding light cigarettes, internal research reports and memoranda at the Defendant companies revealed that they understood the phenomenon of smoker compensation and studied how to manipulate it in order to make their light brands appealing to addicted smokers while continuing to be able to advertise the brands as low tar. For example, a 1978 BATCo memorandum about that company's

internal research acknowledged that "a majority of habitual smokers compensate for changed delivery" and explained that if smokers "choose [a] lower delivery brand . . . than their usual brand" they "will in fact increase the amounts of tar and gas phase that they take in, in order to take in the same amount of nicotine." *Id.* at 861. Dr. Farone testified that Defendants' superior knowledge of compensation (compared to that of scientists outside the industry, including the government) was closely held within Philip Morris and the tobacco industry and there was an "effort on the part of [his] coworkers at Philip Morris, including [his] supervisors, to restrict any public acknowledgment on the part of Philip Morris of the phenomena of compensation." *Id.*

As these examples and hundreds more findings in the district court's opinion demonstrate, the court had before it sufficient evidence from which to conclude that Defendants' executives, who directed the activities of the Defendant corporations and their joint entities, knew about the negative health consequences of smoking, the addictiveness and manipulation of nicotine, the harmfulness of secondhand smoke, and the concept of smoker compensation, which makes light cigarettes no less harmful than regular cigarettes and possibly more. The government presented evidence indicating that specific high-ranking corporate officials were directly informed about these matters, as well as evidence of pervasive knowledge and acceptance of these propositions throughout the Defendant organizations. The overwhelming

indirect and circumstantial evidence was sufficient to allow the district court to reasonably infer that the high level executives, including "CEOs, Vice Presidents, [and] Heads of Research & Development" for Defendants knew about their respective companies' "internal research, public positions, and long term strategies," *id.* at 897, that is, the "internal knowledge and practice" of the company, *id.* at 853. These executives then made, caused to be made, and approved public statements contrary to this knowledge. *See, e.g., id.* at 190 (Philip Morris Vice President and General Counsel declaring "[n]obody has yet been able to find any ingredient as found in tobacco or smoke that causes human disease"); *id.* at 166, 201 (28 years after Reynolds scientists declared the presence of carcinogenic compounds in cigarettes was "now well established," a Reynolds press release and newspaper advertisement declared the connection between smoking and disease "an open controversy"); *id.* at 772 (TI published booklet declaring that secondhand smoke had not been shown to be a health hazard to nonsmokers); *id.* at 796 (Lorillard general counsel testified at trial that the company's public position has always been and continues to be that secondhand smoke is not a proven health hazard); *id.* at 273 (President and CEO of Philip Morris quoted in TIME magazine from deposition testimony claiming that cigarettes are not addictive unless a similar attachment to Gummi Bears is an addiction); *id.* at 285 (TI's Vice President for Public Affairs on television programs flatly denying that nicotine is

addictive, stating the attachment is like being a "news junkie" or "chocoholic").

Specific intent to defraud may be inferred where, as here, there is a pattern of corporate research revealing a particular proposition, for example, that smoking is addictive; an ensuing pattern of memoranda within the corporation acknowledging that smoking is addictive, even though the memoranda may or may not have gone directly to the executive who makes the contrary statement; and the corporate CEO or other official of high corporate status then makes a public statement stating that smoking is not addictive, contrary to the knowledge within the corporation. Based on this sort of evidence and the inferences reasonably drawn from it, a factfinder could permissibly infer that the speaker harbored specific intent to defraud at the time he or she made the false or misleading statement. Moreover, such pervasive knowledge throughout the organizations demonstrates that Defendants' executives at least acted with reckless disregard for the truth or falsity of their statements. As the district court correctly held, such reckless disregard suffices to demonstrate the requisite intent. *Id.* at 897. The law then imputes this specific intent to the corporation.

Defendants argue that, even if the previous discussion presents a correct statement of the law, it is not the standard that the district court applied here. Rather, Defendants assert that the district court relied on an impermissible "collective intent" theory to find specific intent based on public

statements contradicting the "collective knowledge" of the Defendant corporations without finding that any employee harbored specific intent to defraud. Like Defendants and other courts, we are dubious of the legal soundness of the "collective intent" theory. *Saba,* 78 F.3d at 670 n. 6 ("corporate knowledge of certain facts [can be] accumulated from the knowledge of various individuals, but the proscribed intent (willulness) depend[s] on the wrongful intent of specific employees"); *see, e.g., Southland Sec. Corp.,* 365 F.3d at 366; *Nordstrom, Inc. v. Chubb & Son, Inc.,* 54 F.3d 1424, 1435 (9th Cir.1995); *United States v. Bank of New Eng., N.A.,* 821 F.2d 844, 855 (1st Cir.1987); *Woodmont, Inc. v. Daniels,* 274 F.2d 132, 137 (10th Cir.1960); *First Equity Corp. v. Standard & Poor's Corp.,* 690 F.Supp. 256, 260 (S.D.N.Y.1988). We need not pass on the merits of such a standard here, however, because the district court relied on a permissible view of specific intent. Although at times the court articulated a "collective intent" standard, *see Philip Morris,* 449 F.Supp.2d at 895-97, it also based its holding on a proper view of specific intent, *see id.* at 853, 897, and we are satisfied that the court's conclusions based on the proper standard are sufficient to uphold its judgment.

B. Materiality

In their next general challenge to fraud liability, Defendants argue that their false and misleading statements about the health effects of smoking cannot, as a legal matter, be fraudulent because their

statements were not material. This argument is based on a flawed understanding of the materiality requirement.

In order for a false or misleading statement to qualify as mail or wire fraud, it "must concern a material or important fact or matter." *United States v. Winstead,* 74 F.3d 1313, 1320 (D.C.Cir.1996). This materiality requirement is met if the matter at issue is "of importance to a reasonable person in making a decision about a particular matter or transaction." *Id.* Materiality does not require proof that any specific person (or number of people) purchased cigarettes as a result of the false statements. Nor does it require Defendants' false statements to be the cause, reason, or sufficient condition of any person's decision to purchase cigarettes. Moreover, no subjective evidence regarding any particular person is required; the test is only whether a reasonable person would consider the matter to be of importance regarding the transaction.

The false statements identified by the district court would be important to a reasonable person purchasing cigarettes. For example, statements about the adverse health effects of smoking, *see Philip Morris,* 449 F.Supp.2d at 146-208, would be a matter of importance to a reasonable person deciding to purchase cigarettes. The fact that Defendants continually denied any link between smoking and cancer, *see, e.g., id.* at 204, suggests they themselves considered the matter material. So, too, regarding Defendants' false statements on other topics, including

statements concerning: whether smoking is addictive, *id.* at 208-308, whether Defendants manipulated their cigarettes to control nicotine delivery, *id.* at 308-84, whether "light" cigarettes were less harmful than other cigarettes, *id.* at 430-561, whether secondhand smoke is hazardous to non-smokers, *id.* at 692-801, and whether Defendants concealed scientific research and destroyed documents, *id.* at 801-39.

Each of these topics is an important consideration for a reasonable person because each concerns direct and significant consequences of smoking. When deciding whether to smoke cigarettes, tobacco consumers must resolve initial reservations (or lingering qualms) about the potential for cancer, the risk of addiction, or the hazardous effects of secondhand smoke for friends, family, and others who may be exposed. Defendants' prevarications about each of these issues suggests full awareness of this obvious fact; reasonable purchasers of cigarettes would consider these statements important.

Defendants further argue that, because the scientific community had reached a consensus regarding the severely adverse health consequences of smoking, their statements to the contrary would not be believed. *See* Defs. Br. 98 (arguing that "the public was aware of smoking's adverse health consequences and thus any inconsistent assertion by defendants could not be material to a reasonable person"). The question, however, is not whether a reasonable person would have believed Defendants' false statements, but only whether a reasonable person would

have considered the issue "of importance," and the issues considered by the district court clearly met the materiality threshold.

C. First Amendment

In their final general challenge to fraud liability, Defendants claim at least a portion of their statements qualify as protected activity under the First Amendment. Of course, it is well settled that the First Amendment does not protect fraud. *See McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 357, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (stating that the government "may, and does, punish fraud directly"). Recognizing this fact, Defendants argue their statements were not fraudulent, but those arguments are discussed and rejected elsewhere in this opinion. *See supra* Part III.A-B; *infra* Part IV.

Defendants next claim protection under the *Noerr-Pennington* doctrine – a doctrine, rooted in the Petition Clause of the First Amendment, that protects "an attempt to persuade the legislature or the executive to take particular action with respect to a law. . . ." *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 136, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). The protection does not "cover activity that was not genuinely intended to influence government action." *Allied Tube & Conduit Corp. v. Indian Head,* 486 U.S. 492, 508 n. 10, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988).

Defendants' attempt to invoke *Noerr-Pennington* as protection fails because the doctrine does not protect deliberately false or misleading statements. "[N]either the *Noerr-Pennington* doctrine nor the First Amendment more generally protects petitions predicated on fraud or deliberate misrepresentation." *Edmondson & Gallagher v. Alban Towers Tenants Ass'n,* 48 F.3d 1260, 1267 (D.C.Cir.1995) (describing the holding in *Whelan v. Abell,* 48 F.3d 1247 (D.C.Cir.1995)); *see also McDonald v. Smith,* 472 U.S. 479, 485, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985) (finding the Petition Clause does not have "special First Amendment status" and that petitions are not entitled to "greater constitutional protection" than "other First Amendment expressions"); *Whelan,* 48 F.3d at 1255 ("However broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods."). The district court's valid findings of fraud in this case take Defendants' statements out of the *Noerr-Pennington* context because they were clearly and deliberately false. The district court provided countless examples of deliberately false statements by Defendants: "Cigarette smoking causes disease, suffering, and death. Despite internal recognition of this fact, Defendants have publicly denied, distorted, and minimized the hazards of smoking for decades," *Philip Morris,* 449 F.Supp.2d at 146; "Defendants have researched and recognized, decades before the scientific community did, that nicotine is an addictive drug. . . . Notwithstanding the understanding and acceptance of each Defendant that smoking and nicotine are

addictive, Defendants have publicly denied and distorted the truth as to the addictive nature of their products for several decades," *id.* at 208-09; "Defendants have designed their cigarettes to precisely control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction. At the same time, Defendants have concealed much of their nicotine-related research, and have continuously and vigorously denied their efforts to control nicotine levels and delivery," *id.* at 309; "Defendants have known for decades that filtered and low tar cigarettes do not offer a meaningful reduction of risk, and that their marketing which emphasized reductions in tar and nicotine was false and misleading," *id.* at 860; "Despite their internal acknowledgment of the hazards of secondhand smoke, Defendants have fraudulently denied that [secondhand smoke] causes disease," *id.* at 864.

Were these statements false, but not deliberately so, Defendants would have a better argument. But Defendants knew of their falsity at the time and made the statements with the intent to deceive. Thus, we are not dealing with accidental falsehoods, or sincere attempts to persuade; Defendants' liability rests on deceits perpetrated with knowledge of their falsity. Where statements are deliberately false or misleading, *Noerr-Pennington* does not apply. *See Alban Towers*, 48 F.3d at 1267. Indeed, if Defendants' statements had not been made with fraudulent intent, there would be no basis for RICO liability in the first place.

The district court found six alleged acts protected by *Noerr-Pennington* and based its holding on the remaining racketeering activity. *Philip Morris,* 449 F.Supp.2d at 887. All six excluded acts were instances of testimony to Congress and, given the wealth of unprotected racketeering acts, we need not reach the question whether the district court correctly excluded these acts. The remaining acts were intended to defraud consumers, so *Noerr-Pennington* protection does not apply.

IV. Specific Challenges to Fraud Liability

A. "Light" Cigarettes

The first specific fraud finding Defendants challenge relates to their marketing of "light" cigarettes. The district court found: "As their internal documents reveal, Defendants engaged in massive, sustained, and highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes." *Philip Morris,* 449 F.Supp.2d at 860. The court concluded "Defendants have known for decades that filtered and low tar cigarettes do not offer a meaningful reduction of risk, and that their marketing which emphasized reductions in tar and nicotine was false and misleading." *Id.*

Defendants contend they should be immune from liability because the Federal Trade Commission ("FTC") has blessed their use of labels such as "light" and "low tar." This argument is entirely foreclosed by

the Supreme Court's recent decision in *Altria v. Good*, __ U.S. ___, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008), concluding the FTC has never condoned the use of "light" or "low tar" descriptors. *Id.* at 550. Defendants point to a 1966 industry guidance letter from the FTC stating that "a factual statement of the tar and nicotine content (expressed in milligrams) of the mainstream smoke from a cigarette," as measured by the Cambridge Filter Method, was permissible under the FTC Act. *Id.* at 549. The "Commission made clear, however, that the guidance applied only to factual assertions of tar and nicotine yields and did not invite any 'collateral representations . . . made, expressly or by implication, as to reduction or elimination of health hazards.'" *Id.*

Despite Defendants' argument to the contrary, "the FTC has in fact never required that cigarette manufacturers disclose tar and nicotine yields, nor has it condoned representations of those yields through the use of 'light' or 'low tar' descriptors." *Id.* at 550. Although the FTC never prevented Defendants from using misleading descriptors, "agency nonenforcement of a federal statute is not the same as a policy of approval." *Id.* As the Supreme Court held, "neither the handful of industry guidances and consent orders on which petitioners rely nor the FTC's inaction with regard to 'light' descriptors even arguably justifies the pre-emption" argument advanced by Defendants. *Id.* at 551. For the same reasons, these actions fail to constitute FTC authorization of the descriptors that could defeat a finding of specific intent to defraud.

It is also worth noting that the district court in this case did not find liability solely based on the use of descriptors such as "light" and "low tar." The court found Defendants orchestrated "highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes." *Philip Morris,* 449 F.Supp.2d at 860. In addition to the misleading use of descriptors, the district court found "[Defendants'] public statements are blatantly false" in relation to the marketing of "light" cigarettes. *Id.* at 861. The district court went on to find that "[a]s part of the Enterprise's scheme to defraud smokers, Defendants withheld and suppressed their extensive knowledge and understanding of nicotine-driven smoker compensation." *Id.* These findings reveal that fraudulent activity surrounding "light" cigarettes was not merely limited to the use of misleading descriptors. In addition to the fact that the descriptors were not authorized by the FTC, the district court relied on other fraudulent activity by Defendants.

Independent of their FTC-authorization argument, Defendants also insist terms such as "light cigarettes" are not misleading to the public. They analogize "light" cigarettes to sodas which are "low caffeine" and cookies which are "low fat." According to Defendants, the public knows that drinking many "low caffeine" sodas can result in higher levels of caffeine consumption, and eating many "low fat" cookies can result in higher levels of fat consumption. Defendants thus analogize to "light" cigarettes,

maintaining that it is obvious that smoking many "light" cigarettes can result in higher levels of nicotine and tar consumption. But the analogy to "light cigarettes" is inapt. Unlike drinking sodas and eating cookies, the factors behind compensation in "light" cigarettes are largely subconscious: "the smoker will subconsciously adjust his puff volume and frequency, and smoking frequency, so as to obtain and maintain his per hour and per day requirement for nicotine." *Philip Morris,* 449 F.Supp.2d at 467 (citing internal tobacco company documents). Not only is smoker compensation subconscious, but factors such as puff volume and frequency are not even tied to the number of "light" cigarettes smoked. The analogy to sodas and cookies fails; the subconscious nature of smoker compensation enabled Defendants to mislead the public about the health effects of "light" cigarettes.

Finally, Defendants argue their descriptors were simply verbal representations of numerical ratings authorized by the FTC, and thus were literally true. Even leaving aside the fact that literally true statements may nevertheless constitute fraud, this claim founders on the district court's finding that "there are lights of certain brands with higher tar levels than regulars of other brands from the same company, and there are also lights and regulars of the same brands that have the same FTC tar rating." *Id.* at 861. This finding, which Defendants do not attempt to show is clearly erroneous, reveals the descriptors were not

simply representations of numerical ratings and thus were not "literally true."

B. Secondhand Smoke

We turn next to Defendants' claim that the district court erred in finding that they fraudulently denied the adverse health effects of secondhand smoke. Federal Rule of Civil Procedure 52 obliges us to uphold the district court's findings of fact unless they are "clearly erroneous." FED.R.CIV.P. 52(a)(6). Under this highly deferential standard, we may disturb the district court's findings only if we are "left with the definite and firm conviction that a mistake has been committed." *E.g., Boca Investerings P'ship v. United States,* 314 F.3d 625, 630 (D.C.Cir.2003) (quotation marks omitted). This is so even if we "would have decided the case differently," as "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson,* 470 U.S. at 574, 105 S.Ct. 1504.

Defendants contend that their statements disputing the health hazards of secondhand smoke were merely good-faith expressions of opinion. But the district court found to the contrary – that Defendants' representations were fraudulent and not in good faith. *Philip Morris,* 449 F.Supp.2d at 853, 864-65. Under Rule 52, then, the question for us is whether this finding was clearly erroneous.

The district court criticized Defendants' statements regarding secondhand smoke as contrary to the scientific consensus. Defendants object, emphasizing that the district court found no scientific consensus emerged until the issuance of the Surgeon General's 1986 report determining secondhand smoke to be hazardous. Moreover, they point to evidence of selected post-1986 scientific opinions casting doubt on the dangers of secondhand smoke, arguing that even then they possessed some basis for disputing the consensus.

Defendants' objections are beside the point. The district court based its finding of fraudulent intent not just on the existence of a consensus but also on evidence of Defendants' own knowledge. *Philip Morris,* 449 F.Supp.2d at 864-65. Specifically, the district court found that dating back to the 1970s, Defendants' own research and analysis revealed the hazards of secondhand smoke. For example, the district court found that in 1980 a Philip Morris scientist reviewed a paper concluding that secondhand smoke caused "significant damage to airway function" in exposed nonsmokers, and found "little to criticize," deeming the paper "an excellent piece of work which could be very damaging" to the industry. *Id.* at 709 (quotation marks omitted). In 1982, a Philip Morris-sponsored research facility concluded that the "side stream" smoke composing the bulk of secondhand smoke is "more irritating and/or toxic" than the "main stream" smoke inhaled by smokers. *Id.* at 710 (quotation marks omitted). And several TI advertisements

and press releases claimed that an independent 1981 study showing "a significant correlation between lung cancer and secondhand smoke" suffered from a statistical flaw, *id.* at 715, yet the district court found that industry consultants told TI, Reynolds, and Brown & Williamson that TI knew at the time not only that the statistical error did not exist, but also that the study was in fact correct. *Id.* at 717-18.

In addition to these and other findings providing relatively direct evidence that Defendants were aware of the health risks of secondhand smoke, the district court found that Defendants concealed their role in making statements regarding secondhand smoke. While it may be true that purveyors of consumer products, without fraudulent intent, frequently engage in concealed support of positive research in their industries, the concealment of identity by Defendants over so long a period on a subject of such intense controversy is at the very least consistent with knowledge of the falsity of their statements.

Although Defendants insist they had no knowledge of the misleading character of their public statements, they nowhere challenge the accuracy of these or any of the district court's other findings suggestive of their knowledge. Instead, they argue that such findings reveal only facts that were known to the public and that had not, at the time, given rise to a scientific consensus. Again Defendants miss the point. The question is not whether *other* individuals knew that Defendants' claims were false or misleading; the question is whether *Defendants* did.

Regardless of whether a scientific consensus existed at any point, Defendants may be liable for fraud if they made statements knowing they were false or misleading. Based on voluminous evidence, including that summarized above, the district court circumstantially inferred that Defendants did in fact possess such fraudulent intent. Given these unchallenged findings, we have no basis for saying that the district court clearly erred in drawing that conclusion.

C. Addiction

Defendants also claim that the district court clearly erred in finding their representations disputing the addictiveness of cigarettes to be intentionally misleading. We analyze the district court's factual finding as to the misleading character of Defendants' commercial statements for clear error. *E.g., FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41-42 & n. 3 (D.C.Cir.1985). We find none.

Defendants claim that their statements regarding addiction were not intentionally misleading because the term "addiction" is ambiguous. Pointing to the district court's findings that the meaning of the term "addiction" in the scientific community changed over time, Defendants insist that their statements merely clung to the earlier, narrower, definitions of the term, and claim that the district court erroneously converted a semantic dispute into a fraud case. But the district court did not find only that Defendants insisted on retaining an earlier definition of

addiction. It found that they did so as part of a concerted effort to misrepresent the difficulty of quitting smoking. *Philip Morris*, 449 F.Supp.2d at 208-09, 308, 857-59. Defendants fail to demonstrate that this finding was clearly erroneous.

To begin with, Defendants never challenge the district court's findings documenting the impact of nicotine on the body and, more importantly, Defendants' understanding of its effects. *Id.* at 209-11, 216-71. As early as 1963, Brown & Williamson's general counsel wrote a confidential memorandum stating: "We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms." *Id.* at 259 (quotation marks omitted). Further, the district court found that Defendants were aware that cigarette dependence was stronger than mere habit formation. In 1974, a Philip Morris scientist told the company's president that it was "simply not an adequate explanation to say that smoking is a habit, or that it is social behavior." *Id.* at 223 (quotation marks omitted). In 1981, a Philip Morris executive wrote in an article: "Cigarettes are not just habit forming – the body builds up a requirement for them." *Id.* at 228 (quotation marks omitted). Although several industry attorneys expressed dismay at the publication of the article, none disagreed with it. *Id.* In 1985, Philip Morris's top management was informed that research showed that "the majority of smokers wished they did not smoke." *Id.* at 229 (quotation marks omitted). These and numerous other findings – all unchallenged – support

the district court's conclusion that Defendants were aware that nicotine creates a chemical dependency far stronger than a mere habit.

The district court found that despite their knowledge Defendants made numerous statements trivializing and outright denying the dependence cigarettes cause. For example, in 1982 TI issued a press release summarizing testimony that smoking caused an "attachment" comparable to that produced by "tennis, jogging, candy, rock music, Coca-cola, members of the opposite sex and hamburgers." *Id.* at 281 (quotation marks omitted). In 1997, Philip Morris's CEO testified, "If [cigarettes] are behaviorally addictive or habit forming, they are much more like . . . Gummi Bears, and I eat Gummi Bears, and I don't like it when I don't eat my Gummi Bears, but I'm certainly not addicted to them." *Id.* at 273 (quotation marks omitted). In a 1994 television interview, a TI official claimed that there was "no chemical addiction" to nicotine and stated, "[S]ometimes we use the word 'addiction' in very broad terms. We talk about being, you know, news junkies. We talk about being chocoholics." *Id.* at 285 (quotation marks omitted). A 1988 TI press release declared that "it has been impossible to establish that the feelings persons have upon giving up smoking are *anything but* that which would be expected when one is frustrated by giving up *any desired habit.*" *Id.* at 283 (quotation marks omitted, emphases added). Most directly, the district court found that Defendants had their representatives testify that nicotine "did not cause

addiction *or dependence,*" *id.* at 281 (emphasis added), rendering any supposed ambiguities in the word "addiction" beside the point.

The district court concluded that these and other findings reflected a campaign of statements intended to mislead the public into believing that giving up smoking is not markedly more difficult than giving up everyday habits. Although not every statement Defendants made was literally false, even partially true statements can be actionable fraud if intentionally misleading as to facts. *See, e.g., Emery v. Am. Gen. Fin., Inc.,* 71 F.3d 1343, 1348 (7th Cir.1995) ("A half truth, or what is usually the same thing a misleading omission, is actionable as fraud, including mail fraud if the mails are used to further it, if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled."). The district court concluded that Defendants' statements regarding addiction were misleading in this way, and given the above unchallenged factual findings we are not "left with the definite and firm conviction that a mistake has been committed." *Boca Investerings,* 314 F.3d at 630.

D. Altria

In addition to the challenges to fraud liability raised by all Defendants, two Defendants – Altria and BATCo – make a number of arguments specific to them. We begin with Defendant Altria, the holding company owner of Defendant Philip Morris, which

raises several challenges to the district court's finding of liability.

As an initial matter, Altria claims that the district court erred in finding that it used the mails in five of the nine predicate acts it allegedly committed directly. The district court specifically found, based on Defendants' routine mailing practices, that at least two of those five predicate acts were committed through use of the mails. *See Philip Morris,* 449 F.Supp.2d at 884 (Racketeering Acts 69, 80). We need not decide whether this circumstantial inference amounted to clear error, as the other four predicate acts the district court found Altria committed are themselves sufficient to constitute a pattern of racketeering activity. *See id.* (Racketeering Acts 71-72, 74-75).

Altria's central argument is that mailings sent by lawyers could not possibly be mailings in furtherance of a scheme or artifice to defraud, citing several out-of-circuit cases largely standing for the proposition that ordinary litigation mailings containing false matter typically do not themselves constitute a scheme or artifice to defraud. *See United States v. Pendergraft,* 297 F.3d 1198, 1209 (11th Cir.2002); *Nolan v. Galaxy Scientific Corp.,* 269 F.Supp.2d 635, 643 (E.D.Pa.2003); *Morin v. Trupin,* 711 F.Supp. 97, 105-06 (S.D.N.Y.1989); *Paul S. Mullin & Assocs., Inc. v. Bassett,* 632 F.Supp. 532, 540 (D.Del.1986); *Spiegel v. Cont'l Ill. Nat'l Bank,* 609 F.Supp. 1083, 1088-90 (N.D.Ill.1985). Whatever the merit of that proposition, it has nothing to do with the question before

us. Altria makes a very different claim – that mailings sent in furtherance of a separately – proven scheme to defraud somehow fall outside the mail fraud statute's coverage because they are drafted and physically sent by lawyers who themselves have no fraudulent intent. This claim is without merit. Nothing in the mail fraud statute requires a mailing to be fraudulent at all, as long as the mailing is in furtherance of a fraudulent scheme. *See* 18 U.S.C. § 1341 (specifying that the mailing can be "any matter or thing whatever to be sent or delivered" as long as it is in furtherance of "any scheme or artifice to defraud"). Moreover, the statute looks to the intent of the individual who *caused* the mailing, not the individual who drafted or physically mailed it. *See United States v. Diggs,* 613 F.2d 988, 998 (D.C.Cir.1979) ("[A] defendant 'causes' the use of the mails where he does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended." (quotation marks omitted)). Given that the district court permissibly inferred the corporate Defendants' intent from the intent of numerous high-level executives, *Philip Morris,* 449 F.Supp.2d at 897, and given that it found that Defendants "caused" the mailings in order to further the scheme to defraud, *id.* at 881, the fact that attorneys participated in the actual drafting and mailing provides no immunity. Thus, we conclude that the district court properly found Altria liable for its direct participation in the conduct of the affairs of the enterprise, leaving it unnecessary for us to

consider Altria's objections to the findings that it participated through its control of Philip Morris.

Finally, Altria claims that the district court clearly erred in finding that the company joined a RICO conspiracy. We disagree. The district court's findings of fact regarding Altria's actions in furtherance of the goals of the enterprise, both directly and through Philip Morris, *see id.* at 907-08, as well as the voluminous findings of concerted action and explicit agreement by Defendants, amply support the circumstantial inference that Altria conspired with the other Defendants to violate RICO. *See, e.g., United States v. Mellen,* 393 F.3d 175, 191 (D.C.Cir.2004) ("[A] conspiracy can be inferred from a combination of close relationships or knowing presence and other supporting circumstantial evidence." (quotation marks omitted)).

E. BATCo

Defendant BATCo claims that the district court erred in imposing liability on the basis of its conduct outside the United States. Noting that the district court found that its "activities and statements took place outside of the United States," *Philip Morris,* 449 F.Supp.2d at 873, BATCo claims that it enjoys immunity from RICO liability because the statute has no extraterritorial reach. We need not decide today whether RICO has true extraterritorial reach – that is, whether it could reach foreign conduct with no impact on the United States – because the district

court found BATCo liable on the theory that its conduct had substantial domestic effects. *Id.* Because conduct with substantial domestic effects implicates a state's legitimate interest in protecting its citizens within its borders, Congress's regulation of foreign conduct meeting this "effects" test is "*not* an *extra-territorial* assertion of jurisdiction." *Laker Airways Ltd. v. Sabena, Belgian World Airlines,* 731 F.2d 909, 923 (D.C.Cir.1984). Thus, when a statute is applied to conduct meeting the effects test, the presumption against extraterritoriality does not apply. *See Envtl. Def. Fund, Inc. v. Massey,* 986 F.2d 528, 531 (D.C.Cir.1993) (noting that "the presumption [against extraterritoriality] is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States," citing *Laker Airways*).

BATCo argues that the effects test is inapplicable because the United States had no obligation to prove that Defendants' conduct had any effects whatsoever. Although BATCo attributes this to the fact that 18 U.S.C. § 1964(a) does not require the government to prove that it has been injured, we think it better explained by the fact that the mail and wire fraud statutes punish "the scheme, not its success." *Pasquantino v. United States,* 544 U.S. 349, 371, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005). That said, BATCo's point has nothing to do with the case at hand. Here the district court found that BATCo's conduct "had substantial direct effects on the United States." *Philip Morris,* 449 F.Supp.2d at 873. The fact

that some other defendant might commit some other offense without effects in the United States hardly renders BATCo immune from liability for the domestic effects it did cause. Someone who fires a rifle from Canada into the United States and wounds his victim can plainly be convicted of attempted murder. *See Laker Airways,* 731 F.2d at 922 ("[W]hen a malefactor in State *A* shoots a victim across the border in State *B,* State *B* can proscribe the harmful conduct."). This is so even though in general the government may prove attempted murder without establishing that the attempt had any effect whatsoever. Similarly, the fact that effects are not elements of mail and wire fraud offenses or associated RICO violations provides no immunity to those, like BATCo, whose fraud and racketeering has substantial and direct domestic effects.

Thus, we need decide only whether the district court erred in applying the effects test – which asks whether conduct has a substantial, direct, and foreseeable effect within the United States, *see Consol. Gold Fields PLC v. Minorco, S.A.,* 871 F.2d 252, 261-62 (2d Cir.1989) (describing substantial effect as direct and foreseeable) – to the facts of this case. We see no error. The district court found that as part of the overall scheme to defraud, BATCo conducted sensitive nicotine research for Brown & Williamson abroad and secretly shared the results with Brown & Williamson in the United States. *Philip Morris,* 449 F.Supp.2d at 298-304. It further found that BATCo, in concert with other Defendants,

founded, funded, and actively participated in various international organizations, which Defendants themselves saw as instrumental to their efforts to perpetuate what the district court found to be their fraudulent scheme in the United States. *See id.* at 119-23. In one example, TI admitted that "the backwash from events and attacks affecting the industry in smaller countries comes back powerfully to the USA," *id.* at 140 (quotation marks omitted), and praised INFOTAB, an international organization of which BATCo was a founding member, *id.* at 132, for "help[ing] the industry to unite in trying to combat the attacks," *id.* at 140 (quotation marks omitted). Notwithstanding BATCo's demands for a nearly unattainable level of specificity, these unchallenged findings, together with the findings of the tremendous domestic effects of the fraud scheme generally, *see, e.g., id.* at 209, 307-08, make clear that the district court committed no error in finding that BATCo's participation had substantial, direct, and foreseeable effects in the United States. *Cf. Laker Airways*, 731 F.2d at 925-26 (finding allegations that the anticompetitive elimination of a foreign airline increased domestic air fares adequate to support antitrust action without demanding further specificity).

V. Challenges to Likelihood of Future Violations

Having found Defendants' challenges to liability unavailing, we move on to the district court's determination that they are likely to commit future RICO

violations if not enjoined. All Defendants challenge this finding on a number of common bases, and four Defendants – Altria, BWH, CTR, and TI – also bring separate challenges to the court's findings regarding them. We address each in turn.

A. Likelihood of Future Violations

Section 1964(a) grants district courts jurisdiction "to prevent and restrain" RICO violations. 18 U.S.C. § 1964(a). Hence, before a district court may order remedies under RICO it must find the defendant exhibits a reasonable likelihood of committing future violations of the Act. *Disgorgement Opinion,* 396 F.3d at 1198.

Here, the district court found a reasonable likelihood that Defendants would commit future RICO violations. *Philip Morris,* 449 F.Supp.2d at 908-15. Defendants attack this finding, asserting: (1) the district court applied an erroneous legal standard, (2) the Master Settlement Agreement ("MSA") makes future violations unlikely, and (3) Defendants' business practices and public positions alone preclude future violations. We conclude the district court applied the correct legal standard and its factual conclusions were not clearly erroneous.

In the mid-1990s, the attorneys general of several states brought suit against the major tobacco companies for the reimbursement of state costs associated with smoking. Five Defendants, Philip Morris, Reynolds, Brown & Williamson, Lorillard,

and Liggett entered into a settlement agreement, the MSA, with forty-six states and the District of Columbia. The MSA prohibited, *inter alia*, youth marketing, any material misrepresentations regarding the health consequences of tobacco use, agreements between manufacturers to limit either competition or the distribution of information about the health effects associated with smoking, and other specific marketing techniques (e.g., cartoon characters and billboards). The MSA specifically required the dissolution of CTR, TI, and CIAR. The National Association of Attorneys General and the individual states' attorneys general enforce the MSA, which requires informal dispute resolution before any enforcement action commences whenever possible.

To obtain equitable remedies, the government must demonstrate a "reasonable likelihood of further violation[s] in the future." *Savoy Indus., Inc.*, 587 F.2d at 1168 (quotation marks omitted). Considered under the totality of the circumstances, three factors determine whether a reasonable likelihood exists: "whether a defendant's violation was isolated or part of a pattern, whether the violation was flagrant and deliberate or merely technical in nature, and whether the defendant's business will present opportunities to violate the law in the future." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1228 (D.C.Cir.1989). The district court applied this standard – a standard both sides agree is appropriate. *Philip Morris*, 449 F.Supp.2d at 909; Defs. Br. 39-40; Gov. Br. 182.

Defendants quibble with two aspects of the district court's application. First, Defendants assert the district court could not rely on "inferences drawn from past conduct alone" because the MSA "already proscribes future violations" and "imposes a legal barrier to the repetition of such conduct in the future." Defs. Br. 40. This is an odd argument, suggesting a tort settlement automatically limits the remedial options in a RICO suit. Notably, the first two factors of the *First City* test focus entirely on inferences arising from past conduct. 890 F.2d at 1228. And, as the district court correctly found, "[t]he likelihood of future wrongful acts is frequently established by inferences drawn from past conduct." *United States v. Philip Morris USA,* 316 F.Supp.2d 6, 10 n. 3 (D.D.C.2004) (quotation marks omitted); *see also SEC v. Bilzerian,* 29 F.3d 689, 695 (D.C.Cir.1994) (inferring a likelihood of future violations based on the nature of past conduct); *SEC v. Gruenberg,* 989 F.2d 977, 978 (8th Cir.1993); *First City,* 890 F.2d at 1228-29. Defendants attempt to bolster their position by claiming the MSA precludes the need for injunctions by fully addressing their prior misconduct. As discussed *infra,* future violations remain likely notwithstanding the MSA. Therefore, Defendants' argument fails.

Also, Defendants deftly mischaracterize the district court's opinion. Based on a single footnote in the opinion's section discussing the MSA's failure to alter Defendants' conduct and concluding remedies in this case were appropriate, *Philip Morris,* 449 F.Supp.2d

at 913 n. 82, Defendants accuse the trial court of impermissibly "shift[ing] the burden to defendants to prove that RICO violations will not occur in the future . . . under the 'absolutely clear' test." Defs. Br. 42. Contrary to Defendants' fears, the district court obviously did not intend to announce a new standard or alter the reigning standard via footnote. The *First City* standard was carefully articulated at the start of the discussion addressing future violations and conscientiously applied. *Philip Morris,* 449 F.Supp.2d at 908-09, 911-13. The footnote, regarding voluntary termination of illegal conduct, appears much later in the opinion where the court sought to emphasize the suspension of disbelief necessary to agree with Defendants, noting the court must assume "Defendants have complied with and will continue to comply with the terms of the MSA, and that the MSA has adequate enforcement mechanisms" in order to conclude "the MSA obviates the need for injunctive relief." *Id.* at 913 (quotation marks omitted). This is a far cry from altering the legal standard. Indeed, the district court found, under the correct standard, that Defendants continued to commit violations even after 1999, well after the execution of the MSA. *Id.* at 910-11.

Since the district court applied the standard enunciated in *Savoy* and *First City* and gave appropriate weight to the inferences drawn from Defendants' past conduct, we uphold the district court's decision to order remedies.

The district court concluded the MSA "alone [could not] remove the reasonable likelihood of

Defendants' future RICO violations." *Id.* Defendants contend the MSA effectively prevents prospective RICO violations because it prohibits them from participating in an "enterprise" or committing any "predicate acts." The district court, however, found Defendants began to evade and at times even violate the MSA's prohibitions almost immediately after signing the agreement and, consequently, concluded the MSA did not limit the court's ability to order "[a]ppropriate [r]emedies." *Id.* The court's factual findings are not clearly erroneous.

Defendants assert the MSA prevents their participation in a RICO enterprise because the organizations that allowed for joint activity no longer exist, and neither the government nor the district court identified any "joint activity" between Defendants after 1998, the start of the MSA. Defendants' post-agreement activities belie these statements. For example, though the MSA required Defendants to dissolve CIAR, only two days after signing the MSA Lorillard's general counsel wrote Philip Morris, Reynolds, and Brown & Williamson asking to "discuss the status of the plan to reinstate CIAR." *Id.* at 798 (quotation marks omitted). Shortly thereafter, Covington & Burling LLP informed the CIAR contractors "[t]he members of CIAR have decided to create a new organization to continue the work. . . . The members of CIAR that will be members of the new organization intend to continue to fund the research." Gov. Ex. 75,412, at 2. Subsequently, in 2000, Philip Morris initiated a new research program that had the same

offices, phone numbers, and board as CIAR and many of the same employees, management, researchers, peer reviewers, and grantees. *Philip Morris,* 449 F.Supp.2d at 798-99.

CIAR is not the lone example of Defendants' organizations poised to circumvent the MSA's prohibitions against joint activities or participation in an enterprise. The district court found, with the exception of CTR and TI, "all of the other organizations either still exist or can be readily re-activated." *Id.* at 871. For example, even at the time of trial Defendants continued to participate in the Center for Cooperation in Scientific Research Relative to Tobacco ("CORESTA"), "a nonprofit making association with objectives to enhance the scientific cooperation for research on tobacco" perceived as "unique and very valuable" because it enjoys the perception of "being objective, technical and independent." Gov. Ex. 21,788, at 1.

Defendants presume the MSA's prohibition against joint activity is effective. The record, however, demonstrates the tobacco companies retain both the ability and the desire to continue joint activities. Accordingly, the district court did not commit clear error when it determined the MSA could not effectively prevent Defendants' participation in an enterprise.

Defendants next assert the MSA's "scores of injunctions and related prohibitions" prevent "repetition of the core wrongdoing." Defs. Br. 48. The district

court determined the MSA does not prevent Defendants' commission of future racketeering acts because: (1) Defendants have not fully complied with the MSA, (2) the States could not be relied upon "to vigorously enforce the MSA," *see* Br. For Amici Curiae States 7-11, (3) some provisions of the MSA have and will expire, and (4) BATCo and Altria are not subject to the agreement. *Philip Morris,* 449 F.Supp.2d at 913-15.

As evidence of the MSA's failures and pitfalls, the district court noted that despite the MSA Defendants still fraudulently denied the dangers of secondhand smoke, marketed "low tar" cigarettes as a healthier alternative to quitting, and falsely denied manipulating nicotine delivery and marketing to youth. *Id.* at 910. Defendants offer no rebuttal to these factual findings, but instead argue "failure to comply with all the details or the 'spirit' of the MSA does not even begin to approach a RICO violation." Defs. Br. 50. Obviously. But as the district court rightly recognized, Defendants cannot hide behind the MSA to avoid the imposition of RICO remedies when they do not comply with the agreement. *Philip Morris,* 449 F.Supp.2d at 913. Therefore, the district court did not commit clear error when it determined the MSA does not adequately prevent or restrain Defendants' future racketeering activities and did not abuse its discretion by ordering equitable relief.

Defendants claim they have "admitted for years" that "smoking causes lung cancer" and other serious diseases, "smoking is addictive," and "low tar

cigarettes may not be safer." Defs. Br. 53-54, 56. They insist their positions on these issues "preclude future RICO violations." *Id.* at 53. The district court acknowledged Defendants' varying degrees of lip service to these facts, but disagreed that these admissions translated into a guarantee against later violations.

According to the district court, "Defendants' essential position on the relationship of smoking and health remains virtually unchanged" from the fraudulent positions it first took in the 1950s. *Philip Morris*, 449 F.Supp.2d at 204; *see also id.* at 204-08 (citing corporate statements and statements from Defendants' executives). The district court condemned Defendants for failing to embrace the Surgeon General's definition of addiction, to admit nicotine specifically creates and sustains addiction, or to "acknowledge[ ] . . . the reason quitting smoking is so difficult, and not simply a function of individual will power, is because of its addictive nature." *Id.* at 286; *see also id.* at 284-88. Finally, examples in the record of Defendants' marketing campaigns and internal documents amply support the district court's conclusion that Defendants "continue to make[ ] false and misleading statements regarding low tar cigarettes in order to reassure smokers and dissuade them from quitting." *Id.* at 507-08. While we may not have reached all the same conclusions as the district court, under the highly deferential clearly erroneous standard the district court's factual findings have sufficient evidentiary support; its decision to order equitable relief was not an abuse of discretion.

B. Altria

Altria urges, based on its status as a holding company, no factual basis exists for finding it would violate RICO in the future. According to the district court, though, despite Altria's holding company status it "effectively and actively controls the activities of all of its subsidiaries, including Defendant Philip Morris." *Philip Morris,* 449 F.Supp.2d at 203-04 n. 12. The record establishes that Altria management oversees subsidiary policies and operations, *id.* at 907-08, and Altria does not dispute its control over Philip Morris. Moreover, Altria itself "participated directly" in the RICO enterprise and conspiracy. *Id.* at 907. With direct culpability and this level of plenary power over its subsidiaries, Altria clearly remains capable of future RICO violations. Therefore, we uphold the district court's issuance of remedies against Altria.

C. BWH

BWH makes an argument similar to that of Altria. In 2004, Brown & Williamson merged all domestic tobacco operations with Reynolds and was reconstituted into Brown & Williamson Holdings ("BWH"). The district court made no factual findings specific to BWH. Rather, the district court focused throughout its opinion on Brown & Williamson. *Philip Morris,* 449 F.Supp.2d at 31 n. 1 (describing Brown & Williamson as "now part of Reynolds American"). The entire rest of the opinion refers to

"Brown & Williamson" without any mention of the reconstituted holding company.

Based on BWH's status as a "passive holding company," BWH argues the district court erred in finding it is likely to commit future RICO violations. As discussed in relation to Altria, a company's status as a holding company by itself does not preclude RICO liability. Where a holding company, such as Altria, participates directly in the original violations and retains control over subsidiary tobacco operations, it remains capable of repeating its misconduct.

BWH could not have participated in this RICO enterprise as it did not then exist. Nonetheless, if it exercises plenary control over the tobacco operations of its subsidiaries, then, like Altria, it could commit later violations. Because the district court failed to make any findings about the extent of BWH's control over tobacco operations, we cannot know the company's current capabilities. Therefore, we cannot determine whether a reasonable likelihood exists that BWH will commit future RICO violations. Accordingly, we remand this issue for further fact finding and clarification.

D. Mootness as to CTR and TI

CTR and TI argue that the district court's findings relating to the likelihood they will commit future violations render the case against them moot. We agree. The MSA demanded the dissolution of both organizations. At the time of trial, CTR and TI only

existed to wind up their respective affairs. The district court found "no reasonable likelihood of future violations" on the part of TI or CTR and consequently ordered no remedies against them. *Philip Morris,* 449 F.Supp.2d at 915. The court actually encouraged the government to reconsider proceeding against these entities as they "seem to have no actual ability to continue alleged past RICO violations." *Id.* at 916 (quotation marks omitted).

"Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Larsen v. U.S. Navy,* 525 F.3d 1, 4 (D.C.Cir.2008) (quotation marks omitted). A case is moot when "the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated" in circumstances where "it becomes impossible for the court to grant any effectual relief whatever to the prevailing party." *City of Erie v. Pap's A.M.,* 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (quotation marks omitted). For both CTR and TI these requirements have been met. The government nowhere disputes Defendants' claim that CTR and TI no longer exist. They cannot possibly commit future RICO violations. Accordingly, we vacate the judgment as to CTR and TI and remand with directions to dismiss.

VI. Challenges to Remedies

Finally, as to those Defendants the district court properly found likely to commit future RICO

violations, we address their challenges to particular remedies the district court imposed. We also address the cross-appeal seeking additional remedies the district court denied.

A. Subsidiaries

First, Defendants object to the inclusion of their subsidiaries among the persons bound by the remedial order. Rule 65 of the Federal Rules of Civil Procedure indicates that an injunction binds only the parties; their "officers, agents, servants, employees, and attorneys"; and "other persons who are in active concert or participation with" the aforementioned persons. FED. R. CIV. P. 65(d)(2). The rule derives from the common law doctrine that an injunction "not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control" – any person or entity through whom the defendants might carry out enjoined activity and so nullify the order. *Regal Knitwear Co. v. NLRB,* 324 U.S. 9, 14, 65 S.Ct. 478, 89 L.Ed. 661 (1945). A subsidiary corporation is in privity with its parent "in respect to the common corporate business" to the extent it is "so identified in interest with [the parent] that [it] represents precisely the same legal right in respect to the subject matter involved" in the injunction. *Jefferson Sch. of Soc. Sci. v. Subversive Activities Control Bd.,* 331 F.2d 76, 83 (D.C.Cir.1963).

The term "subsidiaries" in the remedial order cannot expand the scope of the injunction beyond that defined by Rule 65(d); however, subsidiaries of Defendants may be personally bound by the order to the extent that they are agents of or in privity with Defendants in the common corporate business of manufacturing, designing, marketing, or selling cigarettes. (Like any person with actual notice of the injunction, subsidiaries that act in concert with Defendants to violate the order would also be subject to contempt.) The record on appeal does not reveal facts sufficient for us to evaluate over which subsidiaries, if any, Defendants exercise sufficient control or with which they so identify in interest regarding cigarettes that they would legitimately fall within the purview of the injunction order. We therefore vacate the order to the extent that it binds all Defendants' subsidiaries and remand to the district court for proceedings to determine whether inclusion of Defendants' subsidiaries, and which subsidiaries, satisfies Rule 65(d).

B. General Injunctions

The district court permanently enjoined Defendants "from committing any act of racketeering, as defined in 18 U.S.C. § 1961(1), relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States," and from

> making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation, or engaging in any public relations or marketing endeavor that is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes. Such material statements include, but are not limited to, any matter that: (a) involves health, safety, or other areas with which a reasonable consumer or potential consumer of cigarettes would be concerned; (b) a reasonable consumer or potential consumer would attach importance to in determining whether to purchase or smoke cigarettes; or (c) the Defendant, Covered Person or Entity making the representation knows or has reason to know that its recipient regards or is likely to regard as important in determining whether to purchase cigarettes or to smoke cigarettes, even if a reasonable person would not so regard it.

Philip Morris, 449 F.Supp.2d at 938. Defendants assert that, "in the face of more than 1,600 pages of findings," these injunctions do not sufficiently specify the acts restrained, in violation of Rule 65(d), due process, and the First Amendment. Defs. Br. 137.

Rule 65(d) requires every order granting an injunction to "state its terms specifically [and] describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required." FED.R.CIV.P. 65(d)(1)(B)-(C). "The Rule was designed to prevent uncertainty and

confusion on the part of those faced with injunctive orders." *Schmidt v. Lessard,* 414 U.S. 473, 476, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974). Because an injunction "prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Id.* Under this standard, we have held injunctions to be too vague when they enjoin all violations of a statute in the abstract without any further specification, or when they include, as a necessary descriptor of the forbidden conduct, an undefined term that the circumstances of the case do not clarify. *See Wash. Inv. Network,* 475 F.3d at 407 (order enjoined all future violations of the applicable statutes, without clarifying the acts restrained); *Gulf Oil Corp. v. Brock,* 778 F.2d 834, 843 (D.C.Cir.1985) (order enjoined "substantially similar" conduct without further specification in a case that provided no examples of what is "similar"); *Common Cause v. NRC,* 674 F.2d 921, 926-27 (D.C.Cir.1982) (order enjoined conduct "similar in nature" without further specification in a case that provided no examples of what is "similar"); *SEC v. Savoy Indus., Inc.,* 665 F.2d 1310, 1318-19 (D.C.Cir.1981) (defendant enjoined not "to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person"); *see also Schmidt,* 414 U.S. at 476, 94 S.Ct. 713 (enjoined "the present Wisconsin scheme"). Even if it tracks statutory language, a general injunction is not too vague if it relates the enjoined violations to the context of the case. *See Savoy Indus., Inc.,* 665 F.2d at 1316-17 (tracking

language of the statute in context of defendant's relationship with issuers of securities). Indeed, we must always apply the fair notice requirement "in the light of the circumstances surrounding (the injunction's) entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent." *Common Cause,* 674 F.2d at 927 (quotation marks omitted).

The two injunctions at issue here sufficiently specify the activities enjoined as to provide Defendants with fair notice of the prohibited conduct. The district court did not abstractly enjoin Defendants from violating RICO or making false statements, but instead specified the matters about which Defendants are to avoid making false statements or committing racketeering acts: the manufacturing, marketing, promotion, health consequences, and sale of cigarettes, along with related issues that Defendants have reason to know are of concern to cigarette consumers. This is not a generalized injunction to obey the law, especially when read in the context of the district court's legal conclusions and 4,088 findings of fact about fraud in the manufacture, promotion, and sale of cigarettes. These injunctions may be broad, but breadth is warranted "to prevent further violations where[, as here,] a proclivity for unlawful conduct has been shown." *Savoy Indus. Inc.,* 665 F.2d at 1317 (quoting *McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 192, 69 S.Ct. 497, 93 L.Ed. 599 (1949) (holding that the "record of continuing and persistent

violations of the [statute] would indicate that that kind of a [general] decree was wholly warranted in this case")). Defendants complain that the volume of findings in this case actually make understanding the injunctions more difficult and chill speech because some of the district court's findings present "express prohibitions" whereas others, like the use of white filter paper for cigarettes, "simply reflect the district court's disapproval" of aspects of Defendants' business practices without finding the conduct fraudulent. Defs. Br. 137. This objection answers itself, as the plain terms of the injunctions prohibit only conduct that would constitute a racketeering act or a "material false, misleading, or deceptive statement or representation," not all activities the court mentioned in its findings.

C. Extraterritorial Effect

Paragraph four of the injunction prohibits the use of "any express or implied health message or health descriptor for any cigarette brand." *Philip Morris,* 449 F.Supp.2d at 938. The government concedes that this prohibition "should not be read to govern overseas activities with no domestic effect." Gov. Br. 215-16. But because paragraph four contains no such limiting language, *see Philip Morris,* 449 F.Supp.2d at 938, we vacate that provision and remand for the district court to reformulate it so as to exempt foreign activities that have no substantial, direct, and foreseeable domestic effects. *See supra* Part IV.E.

D. Corrective Statements

As part of the remedial order, the district court ordered Defendants to disseminate "corrective statements" concerning the topics about which they had previously misled consumers. The court will determine the precise content of the statements at a future date after receiving proposals from the parties, but ordered that they must address five topics: (1) the adverse health effects of smoking; (2) the addictiveness of smoking and nicotine; (3) the lack of any significant health benefit from smoking light cigarettes; (4) the manufacturers' manipulation of cigarette design and composition to ensure optimum nicotine delivery; and (5) the adverse health effects of exposure to secondhand smoke. *Philip Morris,* 449 F.Supp.2d at 938-39. The remedial order sets out schedules for the manufacturer Defendants to follow in disseminating the corrective statements in cigarette package onserts, retail point-of-sale displays, newspapers, television, and their company websites. *Id.* at 939-41. Defendants object to the corrective statements as a whole on the grounds that they did not receive adequate notice of and opportunity to respond to the government's proposed remedy and that the remedy extends beyond the court's jurisdiction under RICO. Regarding the specific means of disseminating the statements, Defendants argue that cigarette package onserts violate the Labeling Act, that the point-of-sale displays are duplicative and impose severe burdens on retailers, and that requiring Defendants to make corrective statements in

various media apart from existing advertising violates the First Amendment.

Notice

Defendants argue that because the government did not disclose its final corrective statements proposal until its post-trial proposed remedial order, the district court denied Defendants due process by ordering a version of that remedy without providing Defendants adequate notice and an opportunity to respond. Although Defendants purport to press this objection in a general fashion "with respect to many other remedies imposed by the district court," they state it with sufficient specificity for our consideration only with regard to corrective statements. Defs. Br. 135. The exact content of the statements is yet to be determined and so is not before us at this stage.

The sequence of events surrounding the remedies phase of the trial did not deprive Defendants of the process they were due. Defendants received the government's proposed remedies, including a general corrective statements proposal, two months before the remedies phase of the trial began. They participated in a fourteen-day, fully briefed remedies trial, at which thirteen witnesses testified and were subject to cross-examination, including at least one government witness who testified about corrective statements. *Philip Morris,* 449 F.Supp.2d at 923. In its post-trial proposed remedial order, the government specified the five categories of corrective statements

(which correspond to the subjects about which the district court found Defendants committed fraud) and the details of its recommended publication campaign. Defendants responded to the government's proposed order in their own post-trial brief and raised numerous legal objections to the propriety of the corrective statements remedy, which the district court considered and resolved in its final opinion and order. *See id.* at 921-23. Defendants have not demonstrated any prejudice from this sequence of events. In their offer of proof to the district court they asserted only that if they had known more "specifics" of the government's proposed remedy before the hearing, they would have retained, and might have offered testimony from, one or more experts addressing the proposal. *See* Defs. Offer of Proof at 9-10. Even on appeal, Defendants suggest no testimony they would have offered, no lines of cross-examination inquiry they would have pursued, and no factual dispute they would have addressed.

This case bears no resemblance to *United States v. Microsoft Corp.*, 253 F.3d 34 (2001), as Defendants attempt to suggest. In *Microsoft,* the district court ordered the break-up and restructuring of Microsoft into two companies without holding any evidentiary hearing to resolve the numerous disputed fact questions surrounding the remedy. *Id.* at 101-02. Microsoft submitted two offers of proof identifying serious unresolved issues of fact and included 53 pages of submissions specifying the evidence it would introduce to challenge the government's representations.

Id. at 103. *Microsoft* gives us no reason to believe Defendants in this case – who enjoyed pre-trial notice and a lengthy remedies trial, and have shown no prejudice – suffered a denial of due process.

Section 1964

A district court that finds a defendant civilly liable for violating RICO has jurisdiction "to prevent and restrain violations of [RICO] by issuing appropriate orders. . . ." 18 U.S.C. § 1964(a). Congress limited relief under section 1964(a) to forward-looking remedies aimed at preventing and restraining future RICO violations. *Disgorgement Opinion*, 396 F.3d at 1198, 1200. Earlier in this litigation, we held that the statute does not authorize disgorgement because it is "both aimed at and measured by *past* conduct": "[i]t is measured by the amount of prior unlawful gains and is awarded without respect to whether the defendant will act unlawfully in the future." *Id.* at 1198. Defendants argue that corrective statements are similarly "focused on remedying the effects of past conduct," *id.*, because they seek to correct Defendants' campaign of deceptive marketing.

The government urges that the corrective statements are a forward-looking remedy authorized under section 1964(a) because future advertising that "may not contain any statements which are themselves false or deceptive" nevertheless inevitably builds upon Defendants' previous false statements and, if uncorrected, "continues the deception, albeit

implicitly rather than explicitly," rendering those advertisements "part of the continuing deception of the public." *Warner-Lambert Co. v. FTC,* 562 F.2d 749, 769 (D.C.Cir.1977); *see Novartis Corp. v. FTC,* 223 F.3d 783, 787 (D.C.Cir.2000). We do not doubt that consumers may "continue to make purchasing decisions based on the false belief" created by a manufacturer's false advertising even when that advertising ceases, *Novartis Corp.,* 223 F.3d at 787 (quoting *Warner-Lambert Co.,* 562 F.2d at 762), but it is less clear whether, and in what circumstances, continuing consumer confusion created by uncorrected but truthful advertising would amount to a knowing fraud. Section 1964(a) authorizes only remedies that prevent and restrain future RICO violations, not all future effects of past RICO violations, *Disgorgement Opinion,* 396 F.3d at 1198, or all future unseemly business practices.

We need not consider this question, however, because as the district court observed and the intervenors here argue, requiring Defendants to issue corrective statements will "prevent and restrain them from making fraudulent public statements on smoking and health matters in the future." *Philip Morris,* 449 F.Supp.2d at 926. Defendants will be impaired in making false and misleading assurances about, for instance, smoking-related diseases or the addictiveness of nicotine – as the district court found they continue to do, *id.* at 925-26 – if they must at the same time communicate the opposite, truthful message about these matters to consumers. Requiring

Defendants to reveal the previously hidden truth about their products will prevent and restrain them from disseminating false and misleading statements, thereby violating RICO, in the future.

Package onserts

One of the vehicles for the corrective statements is a cigarette package onsert, which the district court ordered Defendants to "affix to cigarette packaging, either on the outside of or within the outer cellophane wrapping around the package . . . in the same manner as certain Defendants, such as Philip Morris and Brown & Williamson, have utilized package onserts in the past." *Philip Morris,* 449 F.Supp.2d at 939. Defendants object that the onserts violate the Federal Cigarette Labeling and Advertising Act ("Labeling Act"), which provides that "[n]o statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package." 15 U.S.C. § 1334(a).

The Labeling Act defines a "package" as "a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers." *Id.* § 1332(4). A package onsert is "[a] communication affixed to but separate from an individual cigarette pack and/or carton purchased at retail by consumers, such as a miniature brochure included beneath the outer cellophane wrapping or glued to the outside of the cigarette

packaging." *Philip Morris,* 449 F.Supp.2d at 948; *see Schwab v. Philip Morris USA, Inc.,* 449 F.Supp.2d 992, 1084-85 (E.D.N.Y.2006) (defining onserts as "pamphlets attached to the outside of cartons or packs of cigarettes"), *rev'd on other grounds by McLaughlin v. Am. Tobacco Co.,* 522 F.3d 215 (2d Cir.2008); *United States v. Star Scientific, Inc.,* 205 F.Supp.2d 482, 484 (D.Md.2002) (defining onsert as "a type of external package label").

These definitions show that the corrective statements in an onsert are not "statement[s] . . . on [a] package," 15 U.S.C. § 1334(a), but rather statements in a brochure attached to or included with a package, and thus are not prohibited by the plain language of the Labeling Act. *See Philip Morris,* 449 F.Supp.2d at 928 n. 89. Congress could have used more expansive language to reach statements in onserts had it chosen to do so, but it chose only to preempt the requiring of alternative statements about smoking and health "on any cigarette package." Moreover, the district court and the parties appear to have recognized the distinction between packages and onserts throughout the trial. *See id.* at 206 ("Philip Morris has never told its customers on its cigarette packaging or in onserts that it agrees that smoking causes cancer and other diseases in smokers."), 288 ("Philip Morris replaced the pre-existing package labels with onserts."), 424 ("[Brown & Williamson] began a new test market . . . using its redesigned packaging and onsert. . . . Star Scientific . . . added an informational 'onsert' attached to the

package."); Trial Tr., Jan. 10, 2005 (Philip Morris senior vice president distinguishing between cigarette pack and onsert). We therefore conclude that the onsert remedy does not violate the Labeling Act.

Point-of-sale displays

The district court ordered each Defendant with a retail merchandising program – whereby retailers agree to use the manufacturer's in-store advertising – to design countertop and header displays containing the corrective statements and "require retailers who participate in such program" to display them for two years. *Philip Morris,* 449 F.Supp.2d at 939-40. The freestanding countertop displays must be at least thirty inches high and eighteen inches wide, and retailers must place them on their counters "within the line-of-sight of any customer who is standing in line for the register." *Id.* at 946. The header displays must be of at least equivalent size to Defendants' other brand advertising headers and placed "in an equivalent position with any other brand advertising header" at the top of the cigarette display case. *Id.* at 939-40, 947. Under the injunctive order, each Defendant must "suspend from its Retail Merchandising Program for a period of one year any retailer that fails to comply with this provision." *Id.* at 940.

Retailers affected by this order – none of whom were involved in the litigation in any way – did not receive notice of this remedy or an opportunity to present evidence or arguments to the district court

regarding the impact the injunction would have on their businesses. Nor does it appear that the district court independently considered the impact of this program on affected retailers. In their appellate brief as amicus curiae and in affidavits filed with Defendants' motion for a stay of final judgment pending appeal, the National Association of Convenience Stores represents that this injunction will cost retailers substantial revenue. The convenience stores indicate that countertop space is the most important space within a convenience store, and the loss of one square foot of countertop space can cost the industry $82 million in sales per year. Yet if the retailers choose not to carry the countertop displays, Defendants must suspend them from their retail merchandising program for one year, which one retailer asserted would cost ten to fifteen percent of his convenience stores' annual profits. *See* Hartman Aff. at 2.

Section 1964(a) explicitly cautions that in crafting an injunctive remedy the court must "mak[e] due provision for the rights of innocent persons." 18 U.S.C. § 1964(a). We believe that the district court exceeded its authority by failing to consider the rights of retailers and crafting an injunction that works a potentially serious detriment to innocent persons not parties to or otherwise heard in the district court proceedings. Even though not explicitly bound by the terms of an injunction on pain of contempt, third parties may be so adversely affected by an injunction as to render it improper. *See, e.g., Cook Inc. v. Boston Scientific Corp.*, 333 F.3d 737, 744 (7th Cir.2003).

We therefore vacate the order regarding point-of-sale displays and remand for the district court to evaluate and "mak[e] due provision for the rights of innocent persons," either by abandoning this part of the remedial order or by crafting a new version reflecting the rights of third parties. 18 U.S.C. § 1964(a). Of course, any such remedy the district court imposes on remand can only affect contracts entered after the injunctive order issues. *See Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 315 (D.C.Cir.1987) (explaining an injunction's validity due to the fact that it "does not affect the contractual rights of third parties"). In addition, we agree with Defendants that the injunction appears to order each Defendant separately to require the same retail store to display substantively identical, but separate, signs. The government concedes that, despite the language of the order, the district court could not have intended to require the burden of multiple duplicative displays at each retail store. We therefore direct the district court, if it concludes that some form of a point-of-sale display injunction is still appropriate after considering the rights of third parties and existing contracts, to clarify that its order does not require duplicative displays.

First Amendment

The district court also ordered each Defendant to publish the corrective statements on its corporate website, as a one-time full-page advertisement in thirty-five major newspapers, and as at least ten

advertisements on a major television network over the course of one year. *Philip Morris,* 449 F.Supp.2d at 939-41. The court chose these media in order to "structure a remedy which uses the same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages." *Id.* at 928. The court concluded compelled corrective advertising is permissible under the commercial speech doctrine. *Id.* at 926-28.

The First Amendment protects against government infringement on "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard,* 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). This holds true whether applied to individuals, *see W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), or to companies, *see Pac. Gas & Elec. Co. v. Pub. Utils. Com.,* 475 U.S. 1, 16, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say."). In limited circumstances, however, courts have upheld the government's ability to dictate the content of mandatory speech. This largely occurs in the commercial context.

Under the commercial speech doctrine, the government's "power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions." *44 Liquormart v. Rhode Island,* 517 U.S. 484, 499, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). Thus, the government may require commercial

speech to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Because commercial speech receives a lower level of protection under the First Amendment, burdens imposed on it receive a lower level of scrutiny from the courts. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 637, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-64, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Although the standard for assessing burdens on commercial speech has varied, *Bd. of Trs. v. Fox*, 492 U.S. 469, 476-78, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (describing the diverse levels of scrutiny applied in various cases, including *Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343, *In re R.M. J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982), and *Zauderer*, 471 U.S. at 644, 105 S.Ct. 2265), the Supreme Court's bottom line is clear: the government must affirmatively demonstrate its means are "narrowly tailored" to achieve a substantial government goal, *id.* at 480, 109 S.Ct. 3028.

Defendants object that the "freestanding" corrective statements violate the First Amendment because they are not connected to existing advertising and, therefore, cannot be considered commercial speech. That being the case, Defendants contend the less rigorous commercial speech standard does not apply.

Alternatively, Defendants argue that, even if these statements are commercial speech, the corrective statements do not directly and materially advance a substantial government interest. *See Cent. Hudson,* 447 U.S. at 566, 100 S.Ct. 2343. Defendants' arguments misunderstand the commercial speech doctrine and misstate the commercial speech standard.

Defendants' first argument, that the stand-alone corrective statements do not fall within the commercial speech doctrine because they are not attached to advertisements, is a red herring. The context of the corrective statements does not dictate the level of scrutiny; rather, the level of scrutiny depends on the nature of the speech that the corrective statements burden. *Riley v. Nat'l Fed'n of Blind,* 487 U.S. 781, 796, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) ("Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon."). Here, the district court clearly imposed these statements as a burden on Defendants' current and future commercial speech. *Philip Morris,* 449 F.Supp.2d at 926-28 (justifying ordering the freestanding corrective statements under the commercial speech doctrine).

Commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience" or "speech proposing a commercial transaction." *Cent. Hudson,* 447 U.S. at 561-62, 100 S.Ct. 2343. In addition to information related to proposing a particular transaction, such as price, it can

include material representations about the efficacy, safety, and quality of the advertiser's product, and other information asserted for the purpose of persuading the public to purchase the product. *See, e.g., Zauderer,* 471 U.S. at 637 & n. 7, 639-40, 105 S.Ct. 2265 (information and legal advice about a defective product and the possibility of suing were commercial); *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 66-68, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) (informational brochures discussing "important public issues such as venereal disease and family planning" distributed by contraceptives manufacturer were commercial); *Brown & Williamson Tobacco Corp.,* 778 F.2d at 38, 43 (claims that cigarettes contained one milligram of tar and were "99% tar free" were commercial); *Nat'l Comm'n on Egg Nutrition v. FTC,* 570 F.2d 157, 159, 163 (7th Cir.1977) (holding egg trade association's advertisements about the relationship between eggs and heart disease were commercial speech). Defendants' various claims – denying the adverse effects of cigarettes and nicotine in relation to health and addiction – constitute commercial speech. Defendants disseminate their fraudulent representations about the safety of their products, both in formats that do and those that do not explicitly propose a particular commercial transaction, in attempts to persuade the public to purchase cigarettes.

The fact that some – but certainly not all – of these advertisements involve Defendants as a group joined in advertising their common product, discuss

cigarettes generically without specific brand names, or link cigarettes to an issue of public debate, does not change the commercial nature of the speech. *Bolger,* 463 U.S. at 66 n. 13, 67-68, 103 S.Ct. 2875; *Nat'l Comm'n on Egg Nutrition,* 570 F.2d at 163. Moreover, the reality that these corrective statements may tangentially burden noncommercial speech does not render the statements unconstitutional. A burden on commercial speech, whether it be suppression or mandatory disclosure, only triggers a higher level of scrutiny if the commercial speech is "inextricably intertwined" with fully protected speech. *Riley,* 487 U.S. at 796, 108 S.Ct. 2667 ("[S]peech [does not] retain[ ] its commercial character when it is inextricably intertwined with otherwise fully protected speech."). Here, Defendants' past participation in the public controversy surrounding smoking and health may have been inextricably intertwined with their marketing efforts, but the intentionally fraudulent character of the noncommercial public statements undermines any claim for more exacting scrutiny. *See McIntyre,* 514 U.S. at 357, 115 S.Ct. 1511. Moreover, because the injunctive order cannot retroactively burden Defendants' past communications, to determine the constitutionality of the corrective statements we must look to the future and evaluate whether the district court's order targeting commercial speech cuts too broad a swath.

The issue of corrective advertising's possible peripheral impact on protected speech does not affect the character of the burdened speech, but rather

bears on whether the remedy is sufficiently narrowly tailored to achieve a substantial government interest – in this case, preventing Defendants from committing future RICO violations. We have no reason to think it is not. The district court found that, for over fifty years, Defendants violated RICO by making false and fraudulent statements to consumers about their products. *Philip Morris,* 449 F.Supp.2d at 26-27. The court also found Defendants reasonably likely to commit similar violations in the future, *id.* at 908-15, and concluded the corrective statements were necessary to counteract these anticipated violations, *see id.* at 927 ("The injunctive relief sought here is narrowly tailored to prevent Defendants from continuing to disseminate fraudulent public statements and marketing messages by requiring them to issue truthful communications."). Thus, contrary to Defendants' argument, the publication of corrective statements addressing Defendants' false assertions is adequately tailored to preventing Defendants from deceiving consumers.

The district court has not yet determined the content of the corrective statements. *Id.* at 928. As the validity of its order relies on the commercial nature of the speech it burdens, the court must ensure the corrective disclosures are carefully phrased so they do not impermissibly chill protected speech. *Zauderer,* 471 U.S. at 651, 105 S.Ct. 2265. Consequently, the court must confine the statements to "purely factual and uncontroversial information," *id.,* geared towards thwarting prospective efforts by

Defendants to either directly mislead consumers or capitalize on their prior deceptions by continuing to advertise in a manner that builds on consumers' existing misperceptions. *Warner-Lambert Co.*, 562 F.2d at 769 (concluding, due to Listerine's fifty year history of false advertisements, "advertising which fails to rebut the prior claims . . . [would] inevitably build [ ] upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly"). Assuming the corrective advertising once drafted meets these requirements, it is a permissible restraint on Defendants' commercial speech.

E. Intervention

Tobacco-Free Kids Action Fund and five other public health organizations intervened in both the trial and appeal in order to advocate additional remedies against Defendants. Defendants assert that the intervenors are not properly before the court because they do not have standing and do not have the ability to pursue remedies for RICO violations under the statute. Not surprisingly, the intervenors disagree. Before we address the merits of the intervenors' cross-appeal we must resolve the propriety of their intervention.

Section 1964(b) authorizes the Attorney General to "institute proceedings under" section 1964(a) for equitable remedies. 18 U.S.C. § 1964(b). Private parties, on the other hand, may seek relief under section 1964(c), which allows suits for damages. The

statutory scheme does not directly provide private parties with a cause of action for equitable remedies. *Id.* § 1964(c). According to Defendants, the inability to bring an action under section 1964(a) precludes private intervention in a RICO suit instituted by the government under subsection (a) and permitting private intervenors would contravene congressional intent. *Id.* § 1964(a), (c).

Defendants are wrong. Under Federal Rule of Civil Procedure 24(a)(2), "the question is not whether the applicable law assigns the prospective intervenor a cause of action[, but] [r]ather . . . whether the individual may intervene in an already pending cause of action." *Jones v. Prince George's County,* 348 F.3d 1014, 1018 (D.C.Cir.2003). Therefore, intervention of right only requires "an 'interest' in the litigation – not a 'cause of action' or 'permission to sue.'" *Id.* (citing FED.R.CIV.P. 24(a)(2)). Section 1964(b) reserves for the government the ability to "institute" a cause of action for equitable remedies, but does not bar a private person with a sufficient interest under Rule 24(a)(2) from intervening. Likewise, section 1964(c) designates that private parties may bring a cause of action to pursue damages for RICO violations, but does not prevent them from intervening in a governmental action seeking to "prevent and restrain" future violations. Even where Congress has explicitly excluded private persons from a particular statutory cause of action they may, if not demonstrably contrary to congressional intent, still intervene if (1) they satisfy standing and Rule 24(a) requirements and

(2) their intervention is "limited to the claims of illegality presented by the [government]." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 537, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972) (finding a statute forbidding a particular party from bringing a cause of action may only be read to prohibit intervention by that party if intervention would frustrate Congress's reasons for barring that party from initiating the litigation in the first place). Outside the text of the statute, which is at best silent on this subject, Defendants offer no evidence Congress intended to prevent private organizations from intervening in section 1964(a) actions. Moreover, the intervenors assert no novel "claims of illegality," but merely seek to expand the remedies sought by the government.

Two considerations are left: whether the intervenors satisfy standing and Rule 24(a) requirements. In this circuit, because an intervenor "participates on equal footing with the original parties to a suit," a prospective intervenor must satisfy Article III standing requirements. *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C.Cir.1994); *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732-33 (D.C.Cir.2003). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), the Supreme Court enunciated a three-part test for standing: (1) injury-in-fact, (2) causation, and (3) redressability. *Id.* at 560-61, 112 S.Ct. 2130; *Transp. Workers Union of Am. v. Transp. Sec. Admin.*, 492 F.3d 471, 474 (D.C.Cir.2007). On appeal, Defendants claim the intervenors fail on the first two prongs:

injury and causation. According to Defendants, the intervenors' alleged injuries are "purely conjectural" and no causal connection exists between their injuries and possible ongoing or future RICO violations.

We conclude the intervenors present sufficient injuries directly caused by Defendants' RICO violations. The membership organizations aver, under the umbrella of associational standing, *see UAW v. Brock*, 477 U.S. 274, 281-82, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986), their members suffered injury because Defendants exposed their children to predatory and misleading advertisements intended to entice the children to smoke. "[A] person who received 'a misrepresentation made unlawful under [statute] has suffered injury in precisely the form the statute was intended to guard against.'" *Public Citizen v. FTC*, 869 F.2d 1541, 1548 (D.C.Cir.1989) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)). As we have discussed at length, through their deceptive marketing, Defendants committed various racketeering acts in order to defraud consumers, including acts that violated mail and wire fraud statutes. Intervenor membership organizations, therefore, suffered an injury-in-fact at the hands of Defendants every time Defendants intended to deceive a member or a member's child. As only one intervenor must have standing for us to consider their additional proposed remedy, we need not decide the standing issue as to the remaining intervening public health organizations. *McConnell v.*

FEC, 540 U.S. 93, 233, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003).

Intervenors fulfill the Rule 24(a) requirements if they: (1) submitted a timely application to intervene, (2) "have an interest relating to the property or transaction which is the subject of the action," (3) are "so situated that the disposition of the action may, as a practical matter, impair or impede [their] ability to protect that interest," and (4) have an interest that the existing parties would not adequately represent. *Bldg. & Constr. Trades Dep't,* 40 F.3d at 1282. The intervenors easily satisfy the first two prongs. Defendants do not contest the timeliness of the intervenors' application. And, by demonstrating Article III standing, the intervenors adduce a sufficient interest. *Fund for Animals,* 322 F.3d at 735. The latter prongs are also met. We agree with the district court that the intervenors needed to intercede to protect their interests as the government "substantially altered the scope of the remedies it [sought]" and "no longer share[d] the views of Intervenors as to how extensive the appropriate remedies should be." *United States v. Philip Morris USA Inc.,* No. 99-2496, 2005 WL 1830815, at *5, 2005 U.S. Dist LEXIS 16196, at *24-*25 (D.D.C.2005). Accordingly, we conclude intervention was proper.

F. Cross-Appeal

The government and the intervenors bring a cross-appeal challenging the district court's denial of

additional remedies they sought against Defendants. Specifically, they appeal from the district court's refusal of their proposed counter-marketing campaign, national smoking cessation program, youth smoking reduction plan, and monitoring scheme. They also appeal from the denial of their request for disgorgement, which we affirm as the law of the case. *See Disgorgement Opinion,* 396 F.3d 1190.

We review *de novo* the district court's legal conclusion that the government's proposed counter-marketing, smoking cessation, and youth smoking reduction remedies were beyond its authority to order. Under section 1964(a), the district court may craft only forward-looking remedies aimed at preventing and restraining future RICO violations. *Id.* at 1198. Remedies "focused on remedying the effects of past conduct" or "awarded without respect to whether the defendant will act unlawfully in the future" are beyond the court's statutory jurisdiction. *Id.*

As the government suggests, the proposed counter-marketing and smoker cessation programs are closely related: they share the goal of reducing the number of smokers in America. The former would "requir[e] Defendants to fund a long-term, extensive, culturally-competent public education and counter-marketing campaign . . . aimed at diluting both the impact of Defendants' fraudulent statements and at undermining the efficacy of Defendants' marketing efforts towards youth." *Philip Morris,* 449 F.Supp.2d at 936. The district court concluded that the counter-marketing campaign would "serve to reduce the

number of youth smokers, reduce the number of addicted adult smokers in the future, and thereby potentially reduce the economic incentives for Defendants to continue their fraud." *Id.* Similarly, the smoker cessation program would require Defendants to fund a media campaign "to encourage smokers to seek assistance to quit smoking," a "national tobacco quitline network" to provide access to counseling and medication for quitting smoking, and research to improve "tobacco dependence interventions and physician and clinician training and education." *Id.* at 933. The government and intervenors offer two rationales for these programs.

First, they argue that each future sale of cigarettes to a smoker who became addicted in the past due to Defendants' fraud is a continuing effect of the past fraud, due to the nature of addiction. The government and intervenors urge that, even if the court cannot order recovery of past profits gained by past deception, it can deny Defendants the continuing future profits flowing from their past misconduct; that is, the court may remedy the continuing effects of past illegal conduct because such a remedy is forward-looking and not measured by past conduct. This argument overlooks the explicit instruction of section 1964(a) that district courts may only order remedies "to prevent and restrain violations of [RICO]." 18 U.S.C. § 1964(a). Future cigarette sales, even to addicted smokers, are not by themselves RICO violations. The proposed remedies attempt to prevent and restrain future effects of past RICO

violations, not future RICO violations, therefore they are outside the district court's authority under section 1964(a).

Even those courts that would allow some version of disgorgement under section 1964(a) recognize that the statute is limited to preventing future violations and does not extend to future effects flowing from past violations. *See, e.g., Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345, 355 (5th Cir.2003) ("Section 1964(a) establishes that equitable remedies are available only to prevent ongoing and future conduct."); *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir.1995) ("[T]he jurisdictional powers in § 1964(a) serve the goal of foreclosing future violations, and do not afford broader redress."). Nor do the government's examples from antitrust lend support to their argument. *See, e.g., Ford Motor Co. v. United States*, 405 U.S. 562, 573, 92 S.Ct. 1142, 31 L.Ed.2d 492 (1972) ("The relief in an antitrust case must be effective to redress the violations and to restore competition." (quotation marks omitted)); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 607, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957) (ordering the district court to determine "the equitable relief necessary and appropriate . . . to eliminate the effects of the acquisition offensive to the statute"). The condition of monopolization is itself a violation of the Sherman Act, 15 U.S.C. §§ 2, 3, therefore district courts may order remedies to cure the monopolizing effects of the forbidden anticompetitive combination or acquisition so as to prevent the continuing violation, *id.* § 4. The

same is not true of RICO or the fraud statutes, under which any future violation would have to result from ongoing acts, not ongoing conditions.

The intervenors suggest that remedies aimed at helping addicted smokers quit would "divest" Defendants of the "fruits of [their] ill-gotten gains," which are addicted smokers and the money they continue to pay for Defendants' cigarettes. *Turkette,* 452 U.S. at 585, 101 S.Ct. 2524 (describing the civil RICO remedies as a whole, including treble damages). This rhetoric simply disguises the same argument about continuing effects of past violations. The very authorities upon which the intervenors rely establish only the statute's authorization to "order any person to divest himself of any interest . . . in any enterprise," 18 U.S.C. § 1964(a), by separating the RICO defendant from the RICO enterprise in order to prevent future violations. *See, e.g., United States v. Local 560 of Int'l Bhd. of Teamsters,* 780 F.2d 267, 295 (3d Cir.1985) (removal of a union's corrupt executive board was an act of divestiture).

Second, the intervenors argue that the proposed counter-marketing and smoking cessation campaigns would eliminate Defendants' incentive to market their products fraudulently by shrinking Defendants' customer base. It may be, as one expert testified, that "remov[ing] from the marketplace a population of consumers and potential consumers of defendants' products, namely children" and addicted smokers (the targets of the counter-marketing and smoking cessation campaigns), would eliminate rather than

heighten Defendants' incentive to market to these groups. Bazerman Written Direct Examination at 65. But marketing to these groups is not in itself a RICO violation. Certainly, if Defendants have no incentive to advertise their products then they have no incentive to do so with fraudulent statements, but we reject general deterrence remedies aimed so wide of the statutorily-ordained mark. *Disgorgement Opinion,* 396 F.3d at 1200 (rejecting disgorgement even though it "may act to 'prevent and restrain' future violations by general deterrence insofar as it makes RICO violations unprofitable"). Under the intervenors' theory, any remedy that reduces Defendants' potential customer base in any manner would prevent and restrain RICO violations because Defendants would have less incentive to market their products and therefore potentially market with fraudulent statements. As the Second Circuit observed, this argument goes too far: a remedy "may not be justified simply on the ground that whatever hurts a civil RICO violator necessarily serves to 'prevent and restrain' future RICO violations. If this were adequate justification, the phrase 'prevent and restrain' would read 'prevent, restrain and discourage,' and would allow any remedy that inflicts pain." *Carson,* 52 F.3d at 1182. Such a remedy reaches beyond the bounds of section 1964(a), which authorizes the district court to order injunctions to prevent and restrain fraudulent statements about smoking and health and addiction, not to prevent Defendants from marketing and selling their products at all.

We note that in its brief the government offhandedly mentions an alternative narrower smoking cessation program that would be "calculated to address the number of smokers who would become addicted *after* the judgment, as a result of future fraud," and suggests this program would be a viable option even if we affirm the district court's denial of the original program. Gov. Br. 225. The district court did not address this alternative, and the government does not further describe it or direct us to where we may find it in the record, so we do not consider it.

Only the intervenors appeal from the district court's denial of the government's proposed "youth smoking reduction targets" plan. Under that proposal, the court would require Defendants to reduce youth smoking by six percent each year for seven years, and if Defendants fail to meet an annual target, the court would assess them a $3,000 fine for each youth above the target who continues to smoke, a figure representing the "lifetime proceeds a Defendant could expect to earn from making its brands appealing" to youth. *Philip Morris,* 449 F.Supp.2d at 933-34. The district court denied this injunction because it was not tailored to prevent and restrain future RICO violations for at least two reasons. First, the RICO violation the court found with relation to youth marketing was not Defendants' "continuing efforts to market to youth but rather their false denials of those efforts." *Id.* at 932 n. 91. The youth smoking reduction proposal was not aimed at preventing Defendants from denying their youth

marketing efforts but rather at restraining Defendants from marketing and selling to youth. Second, the court agreed with expert testimony that the youth smoking reduction plan was an "outcome-based" remedy that "tie[s] financial assessments to the outcome of youth smoking . . . rates[, which] may increase or decrease due to input factors beyond Defendants' control." *Id.* at 934. An injunction that would hold Defendants responsible for outcomes they could not control regardless of modifications in their behavior would not serve to prevent or restrain Defendants from committing future RICO violations.

The intervenors' argument in favor of the youth smoking reduction proposal is based on the incorrect assumption that the underlying RICO violation to be prevented and restrained is Defendants' youth marketing, rather than their false denials of their efforts to market to youth. As noted above, we need not decide whether such denials amounted to RICO violations. Even if they did, the district court correctly concluded that an injunction aimed solely at reducing youth smoking rates does not address the section 1964 goal of preventing and restraining the underlying RICO violation. The intervenors' argument is unavailing.

Finally, the district court denied the government's proposed monitoring scheme pursuant to *Cobell v. Norton*, 334 F.3d 1128 (D.C.Cir.2003), because the scheme would "require delegation of substantial judicial powers to non-judicial personnel in violation of Article III of the Constitution." *Philip*

Morris, 449 F.Supp.2d at 935. In *Cobell,* we held that the district court lacked authority to appoint a monitor charged with "wide-ranging extrajudicial duties" to fill "an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." *Cobell,* 334 F.3d at 1142. Although we acknowledged that a monitor may report on a defendant's "compliance with the district court's decree and . . . help implement that decree," we held that the court could not invest the monitor with authority to direct a defendant "to take or to refrain from taking any specific action to achieve compliance" with the court's order or to adjudicate violations of the order as "a roving federal district court." *Id.* at 1143 (citations omitted). Our decision did not turn, as intervenors suggest, on the lack of a complex decree for the monitor to enforce. *See id.*

The government does not challenge the district court's legal conclusion that the government's proposed monitor possessed impermissibly broad powers. Rather, the government argues that the district court should have *sua sponte* created a modified version of the government's monitoring scheme that would not violate the principles of *Cobell.* In support, the government merely demonstrates that courts possess authority to appoint monitors (a proposition the district court did not dispute), and argues that a monitor is necessary in this case because of the complexity of the injunction and the intransigence of Defendants. These assertions do not demonstrate that the district court abused its discretion by

deciding not to create its own monitoring scheme to replace the government's inappropriate proposal.

We therefore affirm the district court's denial of the government's proposed counter-marketing campaign, smoking cessation program, youth smoking reduction plan, and monitoring scheme.

* * *

For the foregoing reasons, we affirm the district court's judgment of liability in its entirety except as to CTR and TI, with regard to which we vacate the judgment and remand with directions to dismiss them from the suit. We also largely affirm the remedial order, including the denial of additional remedies sought on cross-appeal, and remand to the district court regarding only four discrete issues. First, because we have no factual findings specific to BWH, we cannot determine whether it is reasonably likely to commit future violations; therefore, we remand that issue for further fact finding and clarification. Second, to the extent that it binds all Defendants' subsidiaries, we vacate the remedial order and remand to the district court for proceedings to determine whether inclusion of the subsidiaries, and which ones, satisfies Rule 65(d). Third, we vacate the prohibition on the use of health messages or descriptors and remand for the district court to reformulate that injunction so as to exempt foreign activities that have no substantial, direct, and foreseeable domestic effects. Finally, we also vacate the remedial order as it regards point-of-sale displays

and remand for the district court to make due provision for the rights of innocent third parties and clarify that the order, if reinstated in any form, does not require duplicative displays.

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396 F.3d 1190

United States Court of Appeals,
District of Columbia Circuit.
UNITED STATES of America, Appellee
v.
PHILIP MORRIS USA INC., et al., f/k/a
Philip Morris Incorporated, Appellants

No. 04-5252.

Argued Nov. 17, 2004.
Decided Feb. 4, 2005.
Rehearing Denied April 19, 2005.

Appeal from the United States District Court for the District of Columbia (No. 99cv02496). Michael A. Carvin argued the cause for appellants. With him on the briefs were Robert F. McDermott, Jr., Peter J. Biersteker, Jonathan M. Redgrave, Allyson N. Ho, Edward W. Warren, John C. O'Quinn, Timothy M. Broas, Dan K. Webb, Kenneth N. Bass, Edward C. Schmidt, Matthew D. Schwartz, Gene E. Voigts, Richard L. Gray, Bruce G. Sheffler, James A. Goold, Theodore V. Wells, Jr., Murray Garnick, David Eggert, David M. Bernick, J. William Newbold, Michael B. Minton, Richard P. Cassetta, Steven Klugman, and Leonard A. Feiwus.

Robin S. Conrad, Jan S. Amundson, Quentin Riegel, and Beth S. Brinkmann were on the brief for amici curiae Chamber of Commerce of the United States of America, et al. in support of appellant.

Michael R. Dreeben, Attorney, U.S. Department of Justice, argued the cause for appellee. On the brief were Peter D. Keisler, Assistant Attorney General, Mark B. Stern and Alisa B. Klein, Attorneys, Sharon Y. Eubanks, Director, Stephen D. Brody, Deputy Director, and Frank J. Marine, Senior Litigation Counsel.

Before: SENTELLE and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge SENTELLE.

Concurring opinion filed by Senior Circuit Judge WILLIAMS.

Dissenting opinion filed by Circuit Judge TATEL.

SENTELLE, Circuit Judge.

A group of cigarette manufacturers and related entities ("Appellants") appeal from a decision of the District Court denying summary judgment as to the Government's claim for disgorgement under the Racketeer Influenced and Corrupt Organizations Act ("RICO" or "the Act"), 18 U.S.C. §§ 1961-68. The relevant section of RICO, 18 U.S.C. § 1964(a), provides the District Courts jurisdiction only for forward-looking remedies that prevent and restrain violations of the Act. Because disgorgement, a remedy aimed at past violations, does not so prevent or restrain, we reverse the decision below and grant partial summary judgment for the Appellants.

I. Background

In 1999 the United States brought this claim against appellant cigarette manufacturers and research organizations, claiming that they engaged in a fraudulent pattern of covering up the dangers of tobacco use and marketing to minors. The Government sought damages under the Medical Care Recovery Act ("MCRA"), 42 U.S.C. §§ 2651-53, and the Medicare Secondary Payer ("MSP") provisions of the Social Security Act, 42 U.S.C. § 1395y to recover health-care related costs Appellants allegedly caused. The United States also claimed that Appellants engaged in a criminal enterprise to effect this cover-up, and sought equitable relief under RICO, including injunctive relief and disgorgement of proceeds from Appellants' allegedly unlawful activities. The Government sought this relief under 18 U.S.C. § 1964(a), which gives the District Court jurisdiction

> to prevent and restrain violations of [RICO] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise. . . .

18 U.S.C. § 1964(a).

Appellants moved to dismiss the complaint in 2000. The District Court did dismiss the MCRA and MSP claims, but allowed the RICO claim to stand. *United States v. Philip Morris, Inc.,* 116 F.Supp.2d 131, 134 (D.D.C.2000).

Section 1964(a) conferred jurisdiction on the District Court only to enter orders "to prevent and restrain violations of the statute." In considering whether disgorgement came within this jurisdictional grant, the court relied on a decision of the Second Circuit, the only circuit then to have considered "whether . . . disgorgements . . . are designed to 'prevent and restrain' *future* conduct rather than to punish *past* conduct." *United States v. Carson,* 52 F.3d 1173, 1182 (2d Cir.1995) (emphasis in original). After noting that "RICO has a broad purpose [and] the legislative history of § 1964 indicates that the equitable relief available under RICO is intended to be 'broad enough to do all that is necessary,'" *id.* at 1181, the *Carson* court went on to observe that it did not see how it could "serve[ ] any civil RICO purpose to order disgorgement of gains ill-gotten long ago. . . ." *Id.* at 1882. The portion of *Carson* relied upon by the District Court in the present controversy suggested that disgorgement *might* "serve the goal of 'preventing and restraining' future violations," but flatly held that the remedy would not do so "unless there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital

available for that purpose."[1] *Id.* at 1182. The Second Circuit went on to caution that disgorgement would be better justified under this analysis where the "gains [were] ill-gotten relatively recently." *Id.* The District Court accepted the Second Circuit's suggested holding that the appropriateness of disgorgement depends on whether the proceeds are available for the continuing of the criminal enterprise, but ruled that the question was premature, and denied the motion for dismissal on the RICO-disgorgement claim. *Philip Morris,* 116 F.Supp.2d at 151-52. Neither party sought leave to file an interlocutory appeal of that ruling.

The case proceeded, and the Government sought disgorgement of $280 billion that it traced to proceeds from Appellants' cigarette sales to the "youth addicted population" between 1971 and 2001. This population includes all smokers who became addicted before the

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[1] While the *Carson* language may appear to be dicta, the Second Circuit remanded for determination of which disgorgement amounts were sufficiently directed to prevention and restraint to qualify under § 1964(a), thus treating the language on availability of disgorgement as essential to the outcome of the case, and therefore a holding. Some other courts have followed *Carson. See, e.g., Richard v. Hoechst Celanese Chem. Group, Inc.,* 355 F.3d 345, 354 (5th Cir.2003) (observing that "the Second Circuit noted that disgorgement is generally available under § 1964"); *United States v. Private Sanitation Indus. Ass'n,* 914 F.Supp. 895, 901 (E.D.N.Y.1996) ("[T]he disgorgement in this case is clearly directed towards the prevention of future illegal conduct, and is therefore a permissible remedy for civil RICO violations under the limitations imposed by Carson.").

age of 21, as measured by those who were smoking at least 5 cigarettes a day at that age.

After discovery, Appellants moved for summary judgment on the disgorgement claim arguing that (1) disgorgement is not an available remedy under § 1964(a), (2) even if disgorgement were available, the Government's model fails the *Carson* test for permissible disgorgement that will "prevent and restrain" future violations, and (3) even if disgorgement were available, the Government's proposed model is impermissible because it includes both legally and illegally obtained profits in violation of *SEC v. First City Financial Corp.*, 890 F.2d 1215 (D.C.Cir.1989). The District Court denied this motion in a memorandum order designated "# 550." *United States v. Philip Morris USA, Inc.*, 321 F.Supp.2d 72 (D.D.C.2004). On motion of the defendants, the District Court certified Order # 550 for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). That section provides for interlocutory appeal where a district judge has certified that "an order not otherwise appealable . . . involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation. . . ." Under § 1292(b), the Court of Appeals may then decide whether to permit the appeal to be taken from such order. In the present case, we allowed the appeal.

II. Analysis

A. Scope of Review

At the outset, the Government urges that our review should be limited to the narrow question of whether the disgorgement it seeks is consistent with the standards of *Carson,* not whether disgorgement *vel non* is an available remedy under civil RICO. The Government bases this argument on the theory that the order on appeal – that is the memorandum order denying "defendants' motion for partial summary judgment dismissing the Government's disgorgement claim" – was reiterating a prior order on the general question of availability of disgorgement Further, the Government argues, the order spoke anew only to the measure of disgorgement, assuming such disgorgement to be otherwise available. In support of its proposed limitation of our review, the Government relies upon *Yamaha Motor Corp., USA v. Calhoun,* 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996). In *Yamaha,* the Supreme Court dealt with the breadth of review properly conducted by a court of appeals under 28 U.S.C. § 1292(b). *Id.* at 204, 116 S.Ct. 619. The Government selectively quotes from *Yamaha* the sentence that, "The court of appeals may not reach beyond the certified order to address others made in the case." *Id.* at 205, 116 S.Ct. 619. Based on this sentence, the Government then argues that because the first order denying a motion to dismiss had dealt with the question of the availability of disgorgement, this certified interlocutory review of the subsequent summary judgment order is restricted to the new

theory considered by the court on that occasion – that the disgorgement the Government pursued exceeded the standard available for such disgorgement as set by the Second Circuit in *Carson*.

Unfortunately for the Government's position, the *Yamaha* opinion did not end with the sentence upon which the Government relies. The Supreme Court went on to say in the same paragraph: "But the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Id.* (emphasis in original) (quoting 9 J. MOORE & B. WARD, MOORE'S FEDERAL PRACTICE § 110.25 at 300 (2d ed.1995) and citing 16 C. WRIGHT, A. MILLER, E. COOPER, & E. GRESHMAN, FEDERAL PRACTICE & PROCEDURE § 3929 at 144-45 (1977)). Appellants' motion below was for "Summary Judgment Dismissing the Government's Disgorgement Claim," and granting this motion would have resulted in *complete dismissal* of the Government's claim for disgorgement with prejudice. *See* Appellee's App. at 19, 79. Thus the District Court's denial was on the question of whether disgorgement would be allowed *at all*, and we may review it as such regardless of the grounds the District Court gave for its decision. In the memorandum accompanying its denial of this motion, evidencing an accurate understanding of the summary judgment standard provided by Rule 56 of the Federal Rules of Civil Procedure, the District Court noted that "summary judgment is appropriate if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Philip Morris,* 321 F.Supp.2d at 74 (citing FED. R. CIV. P. 56(c)). Significantly, the court further noted that "Defendants argue that any disgorgement which might be ordered upon a finding of liability must be limited by *both the text of Section 1964(a) itself and the holding in* United States v. Carson . . . interpreting that section." *Philip Morris,* 321 F.Supp.2d at 74 (emphasis added). Thus the court clearly implied the possibility that none might be ordered, and that statutory issues outside *Carson* were before the court.

Our dissenting colleague argues that the availability of the disgorgement claim *vel non* is not before us because Appellants did not fully restate their earlier arguments in their motion, but only expressed their reservation in a footnote referencing the District Court's prior rejection of their position. While it is true, as our colleague reminds us, that we have held that a "litigant does not properly raise an issue by addressing it in a 'cursory fashion,' with only 'barebones arguments,'" *Cement Kiln Recycling Coalition v. EPA,* 255 F.3d 855, 869 (D.C.Cir.2001) (per curiam), our prior holdings on that subject have been in very different contexts. In *Cement Kiln,* for example, and in *Wash. Legal Clinic for the Homeless v. Barry,* 107 F.3d 32, 39 (D.C.Cir.1997), relied upon by the dissent, we were determining whether an issue was properly

before us that had been raised in no other fashion. In the present case, we are reviewing a summary judgment decision, presumably according to the standards set forth by the Supreme Court in such decisions as *Yamaha,* and the issue in question was clearly decided by the District Court in the first rejection of the motion to dismiss. The issue was called to the attention of the court as a necessary antecedent in the second summary judgment order, now under direct review, and expressly pointed out in the footnote which our colleague disdains. Furthermore, the motion leading to the order presently before us sought summary judgment of dismissal of the disgorgement claim, not simply a limitation to such disgorgement as might have been supported by the *Carson* test or other factors. Given the Supreme Court's plain teaching in *Yamaha,* particularly its adoption from a learned treatise of the language "it is the order that is appealable, and not the controlling question identified by the district court," *Yamaha,* 516 U.S. at 205, 116 S.Ct. 619 (*see* other authorities, *supra*), *Cement Kiln* and *Barry* have no applicability. *Yamaha* controls. We therefore proceed to review the denial of summary judgment, under the usually applicable standards, not simply the sole question to which the Appellees and the dissent would restrict us.

Our dissenting colleague suggests that we are limited by "our general policy of declining to consider arguments not made to the district court in the motion leading to the order under appeal." Dissent at 1211. We know of no such "general policy" that the

particular issue addressed has to have been raised in the particular motion. Rather, we understand our general policy to be following the instructions of the Supreme Court that we are to "address any issue fairly included within the certified order." *Yamaha,* 516 U.S. at 205, 116 S.Ct. 619. Insofar as our colleague's differing understanding rests on *United States v. British Am. Tobacco (Invs.) Ltd.,* 387 F.3d 884, 892 (D.C.Cir.2004) (citing *United States v. Hylton,* 294 F.3d 130, 135-36 (D.C.Cir.2002)), cited by Dissent at 1213, we do not read that case as supporting a general policy that limits consideration to those arguments raised in the particular motion leading to the certified order, as opposed to being "fairly included" within that order, or even to address the point. The court in *British American Tobacco* held only that an intervenor that had raised a privilege issue with respect to an entire collection of documents at one stage of the litigation, but that failed to participate at all in later proceedings focused on one of the documents, despite having notice, had not adequately preserved its objection as to that single document. 387 F.3d at 887-88. It had nothing to do with the scope of review on an interlocutory appeal under § 1292(b). Neither it nor *Hylton* dealt in any fashion with the breadth of interlocutory review, nor was establishing any standard for the papers in which an argument must have been raised. Each rejected an attempt by an appellant to raise a new ground for the first time on appeal. Appellants before us raised and preserved their argument as set forth in the text above. We read nothing in *British American Tobacco*

or *Hylton* to suggest a general policy barring our review under the *Yamaha* standard.

We find no history of such a general policy that would bar us from considering questions logically antecedent and essential to the order under review. Especially is this so given the Supreme Court's instructions in *Yamaha* that we are to "address any issue fairly included within the certified order." That must include at least issues that are logically interwoven with the explicitly identified issue and which were properly presented by the appellant. Even ignoring the apparent allusion to the broader issue of summary judgment preserved in the caption of the motion, the relief sought, and the footnote provided above, it is difficult to see how we could establish such a policy that would cause us to affirm a decision denying summary judgment when a ground compelling its grant is fairly encompassed within the order. Our colleague's interpretation of general policy would seem to compel us to return for trial a case before us for review of a denial of summary judgment, no matter how plain the absence of substantial question of material fact, on the grounds that the denial of summary judgment had been based on rejection of some other reasoning in a previous motion, even though the trial court had earlier erred in denying the first motion to dismiss – even when the appellant had called that denial to the court's attention in the caption of its motion, and a proposed order accompanying the second motion.

Our dissenting colleague finds in *Yamaha* support for the proposition that "the only issues 'fairly included' within a certified order are those decided in the district court's accompanying memorandum. . . ." Dissent at 1213. We understand the law to be, as suggested in *Yamaha,* that issues are not decided in memoranda at all, but rather in orders. Therefore, consistent with *Yamaha,* we review orders, not memoranda. Our colleague asserts that in *Yamaha* the Court "found 'fairly included' an issue that the district court had resolved in the same opinion in which it decided the issue identified as the controlling question of law." Dissent at 1213. While this may well be the case, the Supreme Court not only did not stress that circumstance, it did not even mention it. Indeed, we note that our colleague had to repair to the unpublished opinion of the District Court to discover the truth of his proposition. We seriously doubt that the Supreme Court intended to establish a precedent that difficult to discover, let alone apply.

Nothing in *United States v. Stanley,* 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987), is to the contrary. The passage relied upon by our dissenting colleague to the effect that courts considering interlocutory appeals under § 1292(b) should "not consider matters that were ruled upon in other orders," *id.* at 677, 107 S.Ct. 3054, did not address a situation like the one before us. Here the order appealed from reiterated, and totally depended upon, an issue fairly encompassed within the motion before that court and the order now before us. In *Stanley,* the court of

appeals undertook interlocutory review of an order dealing with one claim of a multi-claim complaint. In that order, the district court had refused to dismiss a claim asserted under the authority of *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). On appeal, the court of appeals not only affirmed the district court's conclusion as to the *Bivens* claim, but reached back in the record to order the district court to reinstate another claim for relief asserted under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* In the present case, the disputed "prior order" had denied judgment of dismissal on the disgorgement claim. The order concededly before us denied judgment of dismissal on the same disgorgement claim. We see nothing in *Stanley* inconsistent with the later instruction in *Yamaha* recognizing our jurisdiction to "address any issue fairly included within the certified order." *Yamaha,* 516 U.S. at 205, 116 S.Ct. 619. We therefore proceed, obedient to our understanding of *Yamaha,* to review the order before us denying summary judgment.

We review an order denying summary judgment *de novo. Cicippio-Puleo v. Islamic Republic of Iran,* 353 F.3d 1024, 1031 (D.C.Cir.2004). Obedient to *Yamaha,* we will review Order # 550 denying summary judgment applying anew the standards of Rule 56, and will not simply review that part of the District Court's thinking directed to the applicability of the *Carson* standard or the consistency of the Government's proffers with that standard. Therefore,

we must address the issue, logically prior to the *Carson* question, of whether disgorgement is available at all. We hold that the language of § 1964(a) and the comprehensive remedial scheme of RICO preclude disgorgement as a possible remedy in this case.

B. The Availability of Disgorgement

The Government argues that § 1964 contains a grant of equitable jurisdiction that must be read broadly to permit disgorgement in light of *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), and its progeny. The *Porter* Court considered reimbursement awards under the Emergency Price Control Act of 1942 ("EPCA") and concluded that where a statute grants general equitable jurisdiction to a court, "all the inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction." *Porter*, 328 U.S. at 398, 66 S.Ct. 1086. This grant is only to be limited when "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction." *Id.* In this case the text and structure of the statute provide just such a restriction.

As the Supreme Court has repeatedly observed: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (citations omitted). Reading *Porter*

in light of this limited jurisdiction we must not take it as a license to arrogate to ourselves unlimited equitable power. We will not expand upon our equitable jurisdiction if, as here, we are restricted by the statutory language, but may only assume broad equitable powers when the statutory or Constitutional grant of power is equally broad.

As our dissenting colleague correctly notes, the Court in *Porter* was considering whether a district court acting under the authority granted in the EPCA had the authority to order restitution for overcharges. The implication of broad equitable authority in *Porter* came from a statute which empowered the district court to grant "a permanent or temporary injunction, restraining order, or other order." EPCA § 205(a), 56 Stat. 23, 33 (1942). The action before the Court in *Porter* was brought under a section providing that "the Administrator" could bring action against persons engaged in overcharges for "an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." *Id.*

The Supreme Court did not have to make much of a stretch to determine that the phrase "enforcing compliance with such provision," and expressly referring to "a permanent or temporary injunction, restraining order, or other order," would include restitution for amounts collected exceeding the ceilings

determined under the statute. The Government in the present case asks us to work a far greater expansion of the statutory grant enabling the District Court in a civil RICO action brought by the Government under § 1964(a). We further note that the Court in *Porter* was ordering restitution, under a statute designed to combat inflation. Restitution of overcharge works a direct remedy of past inflation, directly effecting the goal of the statute. The Court in *Porter* set forth two theories under which "[a]n order for the recovery and restitution of illegal rents may be considered a proper 'other order'" under the applicable statute. 328 U.S. at 399, 66 S.Ct. 1086. First, the recovery of the illegal payment by the victim tenant "may be considered as an equitable adjunct to the injunction decree," as it effects "the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Id.* (noting that "such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available."). The equitable jurisdiction of the Court having been properly invoked, the Court then had the power "to decide all relevant matters in dispute and to award complete relief. . . ." *Id.* Also, and more to the point, the Court was authorized "in its discretion, to decree restitution of excessive charges in order to give effect of the policy of Congress." *Id.* at 400, 66 S.Ct. 1086. The policy of Congress under the EPCA was to prevent overcharges with inflationary effect. The goal of the RICO section under which the government seeks disgorgement here is to prevent or restrain future violations. We

therefore must consider the forward-looking nature of the remedy in a way not applicable to a different remedy in *Porter* for the accomplishment of a different goal under a different statute.

Section 1964(a) provides jurisdiction to issue a variety of orders "to prevent and restrain" RICO violations. This language indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations. The examples given in the text bear this out. Divestment, injunctions against persons' future involvement in the activities in which the RICO enterprise had been engaged, and dissolution of the enterprise are all aimed at separating the RICO criminal from the enterprise so that he cannot commit violations *in the future*. Disgorgement, on the other hand, is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo. *See, e.g., Tull v. United States,* 481 U.S. 412, 424, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). It is measured by the amount of prior unlawful gains and is awarded without respect to whether the defendant will act unlawfully in the future. Thus it is both aimed at and measured by *past* conduct.

The Government would have us interpret § 1964(a) instead to be a plenary grant of equitable jurisdiction, effectively ignoring the words "to prevent and restrain" altogether. This not only nullifies the plain meaning of the terms and violates our canon of statutory construction that we should strive to give meaning to every word, *see, e.g., Murphy Explor. &*

Production Co. v. United States Dept. of the Interior, 252 F.3d 473, 481 (D.C.Cir.2001), but also neglects Supreme Court precedent. In *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 488, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996), the Court held that compensation for past environmental cleanup was ruled out by the plain language of the Resource Conservation and Recovery Act which authorized actions "to restrain" persons who were improperly disposing of hazardous waste. If "restrain" is only aimed at future actions, "prevent" is even more so.

Mitchell v. DeMario Jewelry, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960), relied on by the Government, is not to the contrary. The *Mitchell* case was brought under the Fair Labor Standards Act of 1938, 29 U.S.C. § 215, 52 Stat. 1060 (1938) ("FLSA"). In that action, the Government was invoking the court's jurisdiction to restrain violations of a section making it unlawful for a covered employer to discharge or discriminate against employees who had filed complaints or instituted actions under the FLSA. The Court reviewed the whole breadth of that broad Act to conclude that the available remedies included not only injunction against further discrimination and mandatory injunctions of reinstatement, but also a "make whole" reimbursement for lost wages because of the discriminatory discharge. As in *Porter,* the Court reiterated that in equitable jurisdiction "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that

jurisdiction." *Mitchell,* 361 U.S. at 291, 80 S.Ct. 332 (quoting *Porter,* 328 U.S. at 398, 66 S.Ct. 1086). In the RICO Act, Congress provided a statute granting jurisdiction defined with the sort of limitations not present in the FLSA or the EPCA. The statute under which the Government sued Appellants, 18 U.S.C. § 1964(a), granted only the jurisdiction which we set forth above. The District Court, so far as is relevant to actions under that section, has jurisdiction only

> *to prevent and restrain* violations of [RICO] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise. . . .

18 U.S.C. § 1964(a) (emphasis added). The order of disgorgement is not within the terms of that statutory grant, nor any necessary implication of the language of the statute.

In considering the broad language from *Porter* upon which our dissenting colleague relies for the proposition that we should find disgorgement available because Congress has not taken it away, we note that the Supreme Court considered a similar

argument in *Meghrig*. The High Court nonetheless limited the available remedies under CERCLA to those provided in the statute, declaring that

> where Congress has provided "elaborate enforcement provisions" for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies. . . ."

516 U.S. at 487-88, 116 S.Ct. 1251 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981)).

In RICO, as in RCRA and in CERCLA, Congress has laid out elaborate enforcement proceedings. One of those proceedings is a government action brought under § 1964(a). That one does not provide for disgorgement. That one provides only for orders which "prevent or restrain" future violations. Disgorgement does not do that.

It is true, as the Government points out, that disgorgement may act to "prevent and restrain" future violations by general deterrence insofar as it makes RICO violations unprofitable. However, as the Second Circuit also observed, this argument goes too far. "If this were adequate justification, the phrase 'prevent and restrain' would read 'prevent, restrain, and discourage,' and would allow any remedy that inflicts pain." *Carson*, 52 F.3d at 1182.

The remedies available under § 1964(a) are also limited by those explicitly included in the statute. The words "including, but not limited to" introduce a non-exhaustive list that sets out specific examples of a general principle. *See Dong v. Smithsonian Inst.*, 125 F.3d 877, 880 (D.C.Cir.1997). Applying the canons of *noscitur a sociis* and *ejusdem generis,* we will expand on the remedies explicitly included in the statute only with remedies similar in nature to those enumerated. *See Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler,* 537 U.S. 371, 384, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003). The remedies explicitly granted in § 1964(a) are all directed toward future conduct and separating the criminal from the RICO enterprise to prevent future violations. Disgorgement is a very different type of remedy aimed at separating the criminal from his prior ill-gotten gains and thus may not be properly inferred from § 1964(a).

The structure of RICO similarly limits courts' ability to fashion equitable remedies. Where a statute has a "comprehensive and reticulated" remedial scheme, we are reluctant to authorize additional remedies; Congress' care in formulating such a "carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 209, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) (quoting *Mertens v. Hewitt Associates,* 508 U.S. 248, 251, 254, 113 S.Ct. 2063,

124 L.Ed.2d 161 (1993)) (internal quotations omitted) (emphasis in original). RICO already provides for a comprehensive set of remedies. When Congress intended to award remedies that addressed past harms as well as those that offered prospective relief, it said as much. In a criminal RICO action the defendant must forfeit his interest in the RICO enterprise and unlawfully acquired proceeds, and may be punished with fines, imprisonment for up to twenty years, or both. 18 U.S.C. § 1963(a). In a civil case the Government may request limited equitable relief under § 1964(a). Individual plaintiffs are made whole and defendants punished through treble damages under 18 U.S.C. § 1964(c). This "comprehensive and reticulated" scheme, along with the plain meaning of the words themselves, serves to raise a "necessary and inescapable inference," sufficient under *Porter,* 328 U.S. at 398, 66 S.Ct. 1086, that Congress intended to limit relief under § 1964(a) to forward-looking orders, ruling out disgorgement.

Congress' intent when it drafted RICO's remedies would be circumvented by the Government's broad reading of its § 1964(a) remedies. The disgorgement requested here is similar in effect to the relief mandated under the criminal forfeiture provision, § 1963(a), without requiring the inconvenience of meeting the additional procedural safeguards that attend criminal charges, including a five-year statute of limitations, 18 U.S.C. § 3282, notice requirements, 18 U.S.C. § 1963(*l*), and general criminal procedural protections including proof beyond a reasonable doubt.

Further, on the Government's view it can collect sums paralleling – perhaps exactly – the damages available to individual victims under § 1964(c). Not only would the resulting overlap allow the Government to escape a statute of limitations that would restrict private parties seeking essentially identical remedies, *see Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987), but it raises issues of duplicative recovery of exactly the sort that the Supreme Court said in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 269, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), constituted a basis for refusing to infer a cause of action not specified by the statute. Permitting disgorgement under § 1964(a) would therefore thwart Congress' intent in creating RICO's elaborate remedial scheme.

A note appended to the statute stating that RICO "shall be liberally construed to effectuate its remedial purposes" does not effect this structural inference. Organized Crime Control Act of 1970, Pub.L. No. 91-452, § 904(a), 84 Stat. 947 (codified in a note following 18 U.S.C. § 1961). This clause may warn us against taking an overly narrow view of the statute, but "it is not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). The text and structure of RICO indicate that those remedial purposes do not extend to disgorgement in civil cases.

The Second Circuit in *Carson* has interpreted "prevent and restrain" not to eliminate the possibility of disgorgement altogether, but to limit it to cases where there is a finding "that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Carson*, 52 F.3d at 1182. The Fifth Circuit adopted this interpretation in a case holding that disgorgement after the defendant had ceased production of an allegedly defective product would be inappropriately punitive rather than directed toward future violations. *See Richard v. Hoechst Celanese Chemical Group*, 355 F.3d 345, 355 (5th Cir.2003). While we avoid creating circuit splits when possible, in this case we can find no justification for considering any order of disgorgement to be forward-looking as required by § 1964(a). The language of the statute explicitly provides three alternative ways to deprive RICO defendants of control over the enterprise and protect against future violations: divestment, injunction, and dissolution. We need not twist the language to create a new remedy not contemplated by the statute.

Our colleague reminds us that the Supreme Court has instructed "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Dissent at 1220 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d

526 (1989)). This would be most devastating to one side of the case or the other if we were in fact attempting to overrule a Supreme Court precedent. That is, if there were a Supreme Court case that had direct application to the facts before us, we would be required to follow it, and that would be the end of the matter. We would not need to consider any other line of cases. However, the *Rodriguez de Quijas* language is not particularly helpful when no precedent of the Supreme Court "has direct application," as in the present case. There is not a Supreme Court case dealing with the jurisdiction of a district court to order disgorgement under RICO § 1964(a). There is not a Supreme Court case discussing that question. There is, in short, no Supreme Court case having direct application. With no Supreme Court case having direct application, it is our duty to construe the statute. That is what we have done.

III. Conclusion

Because we hold that the District Court erred when it found that disgorgement was an available remedy under 18 U.S.C. § 1964(a), we reverse the District Court and grant summary judgment in favor of Appellants as to the Government's disgorgement claim.

WILLIAMS, Senior Circuit Judge, concurring.

I join the opinion for the court. I write separately to emphasize problems with the government's fallback interpretation of 18 U.S.C. § 1964(a), under which the government could obtain disgorgement for purposes of reducing the defendant's *ability* to commit future RICO violations, with the amount accordingly limited to assets "being used to fund or promote the illegal conduct, or [that] constitute capital available for that purpose." *United States v. Carson,* 52 F.3d 1173, 1182 (2d Cir.1995). This superficially appealing interpretation in fact creates a kind of pushmi-pullyu, a beast that Congress is most unlikely to have ordained.

I.

The statute gives district courts "jurisdiction to prevent and restrain [RICO] violations." 18 U.S.C. § 1964(a). Reasoning that pure deterrence was an impermissible objective of orders under § 1964(a), the Second Circuit went on to find that disgorgement could "prevent and restrain" if limited to the amount of ill-gotten gains that were "being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Id.* at 1182. Because money is fungible, as indeed are virtually all resources when viewed as enablers of future criminal conduct, the government here refines its *Carson*-derived fallback position, quite sensibly rejecting any limitation to "ill-gotten gains" in the form of specific

money or resources so gained. Such a limit, we have said (applying a different statute), would lead to absurd results. *SEC v. Banner Fund International,* 211 F.3d 602, 617 (D.C.Cir.2000). There the defendant proposed to confine disgorgement to the "actual assets" unjustly received. We said that what mattered was not the specific assets but the *amount* by which the defendant was unjustly enriched; the alternative would allow a defendant to escape liability by spending ill-gotten gains while husbanding other assets. *Id.* at 617. Thus the government's proposal is that the amount of the ill-gotten gains should set a ceiling on the disgorgement recovery, subject to the further limit mentioned above – essentially purporting to limit the disgorgement to crime-enabling resources, broadly construed.

In *Carson* itself the court ruled that this prevented the government from forcing disgorgement of funds, ill-gotten in the distant past, from a RICO defendant by then retired from the RICO enterprise itself (a union). In the context of corporate defendants such as those before us, a possible limit would be the entire net worth of the companies (a good deal less than the $280 billion that the government claims to have been ill-gotten gains). But perhaps not. Even that limit is arbitrary, as resources can be used for criminal purposes even if offset by company debt. Subject to the bankruptcy laws, nothing in the logic of the crime-enablement theory clearly calls for stopping at confiscation of the shareholders' interests; why not the bondholders' as well?

On the other side, it might be plausible under the *Carson* theory to exempt firm resources now devoted to non-tobacco enterprises. It is probably about as difficult for these defendants to re-allocate resources from the businesses of cheese and crackers, for example, to criminality in the sale of cigarettes, as for the union in *Carson* to lure Carson and his funds back from retirement to union criminality.

In short, *Carson* and the government's fallback position send the court off on a virtually metaphysical quest to draw lines based on the likelihood that particular resources will be devoted to crime.

II.

It is hardly surprising that there are only gossamer lines between drastic disgorgement (destruction of bondholder as well as shareholder wealth) and relatively mild disgorgement (cordoning off resources in non-tobacco subsidiaries). The plain fact is that wealth deprivation is an extremely crude device for "prevent[ing]" criminal behavior. Granted, a criminal miscreant with a billion dollars is potentially more dangerous than an impoverished criminal miscreant. But ordinarily the forces most affecting the likelihood of criminal action are, besides the actors' ethical standards and sense of shame, truly forward-looking conditions: the returns to crime versus the possible costs, all adjusted for risk (such as the risk of getting caught).

Confusion arises from an ambiguity in our understanding that, in the civil context, such remedies as damage awards and restitution "deter," and thus in a sense "prevent" commission of torts, breaches of contract, and other civil wrongs. It is quite true that a rule or practice of awarding such remedies deters, and thus prevents, such wrongs. Indeed, under one viewpoint that is the primary or even sole purpose of awarding such remedies. *See* William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (1987). But it is the *rule* or *practice* that creates the incentive. To make the rule credible, of course, the awards must be made; but no individual *award* has a material deterrent effect.

To evaluate that last statement consider a society that empowered some deus ex machina to randomly excuse one damage judgment in a million. Such an exception to the rules would have no detectable effect on the commission of torts or breaching of contracts. Even the lucky defendant who enjoyed the benefit of the pardon wouldn't – unless a complete fool – materially alter his future conduct because of that manna from heaven.

The equity court, empowered under § 1964(a) to "prevent and restrain" future violations, has before it the history of the defendant, including his past wrongs. It can decree relief targeted to his plausible future behavior. It can define the conditions bearing directly on that behavior. It can, for example, establish schedules of draconian contempt penalties for future violations, and impose transparency requirements so

that future violations will be quickly and easily identified.

In assessing the likelihood that Congress intended an additional disgorgement remedy, it makes sense to inquire into the tendency of such an implied remedy to "prevent and restrain" future violations by the defendant. Of course the rule the government seeks here would be a rule, not merely a random extra penalty. But the question would be its incremental effect, on top of (1) RICO's explicit provisions for criminal penalties (including disgorgement and imprisonment under § 1963(a)) and for victim recoveries (trebled) under § 1964(c), and (2) the whole available panoply of genuinely forward-looking remedies – express controls over substantive conduct, transparency-enhancing orders, and contempt penalties for violations. It seems almost inconceivable that many aspiring criminals would find the incremental risk decisive. I find it hard to imagine a waffling villain – already in court for RICO violations – saying to himself: "Well, my chances of escaping § 1963(a) forfeiture and imprisonment because of the statute of limitations and the burden of proof, and of escaping treble damages under § 1964(c), and contempt penalties for violating the court's orders, still leave RICO violations attractive on a net basis; but that implied disgorgement under § 1964(a) – wow! Too much. It tilts me over the line."

The weakness of that scenario supports the inference that for the defendant who winds up before the equity court, Congress intended the words "prevent

and restrain" to authorize only a tailored, forward-looking remedy. Penalties for violations of the court's decree, and transparency-enhancing measures meet that standard. A purported § 1964(a) disgorgement remedy, on top of those explicitly authorized, would provide only a trivial incremental effect (the reverse of the pardon granted once in a million), and would not qualify. Nor would disgorgement aimed at reducing the defendant's crime-enabling resources, a factor linked only crudely to his future tendency toward criminality.

Once we (1) accept the proposition that § 1964(a) limits the equity court to forward-looking remedies, as even the dissent appears to do with respect to the government's narrower argument, *see* Dissent at 1224-25 ("I also share the Second Circuit's apparent conclusion . . . that disgorgement may be ordered only to prevent and restrain *a defendant* from future RICO violations."), and (2) reject the supposition that "whatever hurts a civil RICO violator necessarily serves to 'prevent and restrain' future violations," *Carson,* 52 F.3d at 1182, the court must try to draw lines between equitable remedies that merely "hurt" the defendant and ones that have a genuine tendency to "prevent and restrain" his future violations.

Because disgorgement under § 1964(a) so evidently lacks that tendency, the dissent relies on *Porter* and on the government's experts. *Porter* indeed includes the twice cited phrase suggesting that "[f]uture compliance may be more definitely assured if one is compelled to restore one's ill-gotten gains."

Dissent at 1223, 1224. But the statute at issue in *Porter* gave district courts power to issue orders "enforcing compliance" and thus didn't seem to narrow the grant to forward-looking remedies. Indeed the *Porter* dissent never suggests such a limit; nor, so far as appears, did the defendant firm. For construing § 1964(a), *Porter* is of remarkably little help.

The expert testimony offered by the government for the proposition that backward-looking disgorgement will "'prevent and restrain' defendants from committing future RICO violations," *see* Dissent at 1226, serves no better. Obviously such testimony cannot alone resolve the issue, turning legal analysis of the statute into a fact battle among experts. Thus the experts' testimony is valuable for its analytic quality, not its utterance by a PhD.

The dissent's genuflection before the experts leaves the reader to imagine some supporting analysis. Lest the imagination run riot, I attach an appendix containing *all* of the expert testimony that the government saw fit to offer on the point in the summary judgment motion. The crux is Dr. Franklin Fisher's statement:

> [Defendants' experts] have also suggested that enjoining Defendants from future illegal behavior and threatening them with the possibility of financial penalties would be more effective as future deterrents than would be disgorgement. Professor Weil, for example, suggests that 'the Court could establish now a schedule of fines or punishments that it

> would levy should the Defendants engage in prohibited behavior.' These experts forget that laws prohibiting this behavior already exist and that, despite these laws and their associated remedies, the Defendants allegedly chose to engage in the illegal behavior. In this context, it is important to note that requiring Defendants to pay proceeds would strengthen the credibility of existing laws and thus provide additional economic incentives to deter future misconduct.[1]

While it is a nice rhetorical move to point out that the defendants violated RICO (as we must assume) despite existing sanctions, Fisher offers no analysis as to why the presence of a civil disgorgement remedy in favor of the government would have reduced the likelihood of violations. (Indeed, on the government's theory – that the statute actually creates such a remedy – the defendants would have taken that into account in deciding to proceed with violations.) More important, Fisher looks at the wrong setting. Before this (or any) RICO litigation against a particular defendant, that defendant would have operated without the spotlight of the lawsuit itself. (That may explain why the government let the

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[1] United States Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim, Appellee's Appendix at 813-14. Although Appellee's Appendix was filed under seal, the expert testimony presented to the court has also been posted by the government on its website.

statute of limitations run for decades, and why the victims failed to seek treble damages.) Now the spotlight is on, and the plausible explanations for non-application of the explicit remedies (other than § 1964(a) equitable relief) have disappeared. And the district court can amplify the spotlight with transparency-enhancing and prior-approval measures. The real question is whether the imposition of this extra remedy on the defendants before the court – backward-looking civil disgorgement in favor of the government – would materially alter their readiness to persist in violations, in the face of all RICO's explicit remedies, and a forward-looking schedule of penalties for even minute infractions, made doubly effective by compulsory disclosure and approval measures. The government's experts simply did not address that question. This court's own analysis provides a clear answer that the extra "remedy" would not do so.

The dissent's use of the government's experts is part of its effort (in its qualified endorsement of the government's fallback position) to transform an issue of statutory interpretation into one of fact. *See* Dissent at 1222-23, 1227-28; *see also id.* at 1223 (noting that in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996), there was no affirmative evidence that the defendants were likely to commit future RCRA violations, and thus suggesting that the case was something other than pure statutory interpretation). But the "facts" hypothesized by the dissent are unrelated to the real world

faced by RICO defendants – already arraigned for their past offenses and subject to a battery of new disincentives on top of all RICO's conventional explicit remedies. Statutory interpretation shouldn't turn on factual hypotheticals such as, "What if pigs had wings."

III.

The above analysis seems to me to confirm what intuition suggests about the jurisdictional issue in this case. Even the most narrowly formulated question about the validity of the district court's order – the choice between the government's primary position (that § 1964(a) creates unlimited discretion to order disgorgement) and its fallback position (that it provides authority to award crime-enabling disgorgement) – requires the court to plumb the meaning of § 1964(a). The issues in this case, all turning on the interpretation of § 1964(a)'s lone sentence, are so thoroughly enmeshed that we needn't explore the court's language limiting § 1292(b) jurisdiction to issues "logically interwoven" with the explicitly identified issue. Maj. Op. at 1196. The dissent's hypotheticals as to what might be covered, *see* Dissent at 1212, plainly depend on an astonishingly broad notion of either logic or weaving. Having analyzed § 1964(a) and having found the order in conflict with its terms, the court must reverse.

One final note. The dissent chides the court for creating a circuit split. *See* Dissent at 1208. But if we

confined ourselves to what the dissent acknowledges to be properly before us, and adopted the dissent's preferred position (that disgorgement is available like any other equitable remedy, regardless of its likely effects on a defendant's future behavior, simply because RICO doesn't explicitly preclude it), we would create no less of a split between this circuit and the Second.

Appendix

> Excerpt from United States Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim, Appellee's Appendix at 812-14.

B. *Disgorgement Provides Economic Incentives That Will Prevent Further RICO Violations*

172. Despite the fact that it is not necessary for the United States to prove this, disgorgement will prevent and restrain further bad acts.

173. Drs. Fisher and Kothari have both stated in their expert reports and deposition testimony, that disgorgement of the proceeds calculated by Dr. Fisher would in fact act to prevent and restrain future RICO violations. Dr. Fisher directly addressed this point in his rebuttal report in which he states:

> Defendants' experts have suggested that disgorgement of ill-gotten gains such as the proceeds sought in this matter will not serve the goal of preventing or restraining the

> defendants from engaging in similar bad acts in the future. For example, Professor Carlton argues, "Having to disgorge past proceeds, by itself, would not affect a defendant's incentives to engage in misconduct in the future because it would not affect the returns (if any) from future misconduct." I address these criticisms with well-known economic principles. What Professor Carlton and the other defendants' experts who espouse this view fail to recognize is that requiring defendants to pay proceeds will affect their expectations (and those of others contemplating malfeasance) about the returns from future misconduct. As a matter of economic principle, the higher the proceeds amount, the lower the expected returns from future misconduct and the greater the desired effect of deterrence.
>
> Expert Rebuttal Report of Franklin Fisher, *United States v. Philip Morris,* (R. 1450; filed July 24, 2002) at 4-5 ¶ 12.

174. Dr. Kothari's expert report confirms Dr. Fisher's conclusion:

> Requiring the defendants to pay ill-gotten proceeds is relevant. The economic incentive for illegal behavior is higher (for defendants and onlookers) if defendants are not required to pay the proceeds. While payment of proceeds has some of the features of sunk cost, it is not identical to a sunk cost because it will affect future decisions or behavior. The

> higher the proceeds paid the greater the economic incentive to avoid illegal behavior in the future.
>
> Expert Report of S.P. Kothari, *United States v. Philip Morris,* (R. 1451; filed July 24, 2002) at 3-4, ¶ 8.

175. Dr. Fisher expressly states in his expert report:

> [Defendants' experts] have also suggested that enjoining Defendants from future illegal behavior and threatening them with the possibility of financial penalties would be more effective as future deterrents than would be disgorgement. Professor Weil, for example, suggests that 'the Court could establish now a schedule of fines or punishments that it would levy should the Defendants engage in prohibited behavior.' These experts forget that laws prohibiting this behavior already exist and that, despite these laws and their associated remedies, the Defendants allegedly chose to engage in the illegal behavior. In this context, it is important to note that requiring Defendants to pay proceeds would strengthen the credibility of existing laws and thus provide additional economic incentives to deter future misconduct.

> Expert Rebuttal Report of Franklin Fisher, *United States v. Philip Morris,* (R. 1450; filed July 24, 2002) at 5-6, ¶ 14.

176. Dr. Fisher has repeatedly confirmed the preventative benefit of disgorgement. At his deposition he stated:

> Q. . . . the idea is that disgorgement prevents and restrains future violations by altering the defendants' expectations about the returns they might receive from future misconduct. Is that right?
>
> A. . . . I believe that to be correct.
>
> Q. Does disgorgement prevent and restrain future RICO violations in any other way?
>
> A. Well, it removes at least some, and possibly all, of the assets with which to engage in future illegal activities.

> Deposition of Franklin Fisher, *United States v. Philip Morris,* September 12, 2002, 828:4-19 (Exhibit 77).

177. "[A]s I have repeatedly and clearly stated in my report and deposition testimony, disgorgement of Defendants' proceeds, as I have calculated them, would in fact act to prevent and restrain future RICO violations." Declaration of Franklin Fisher, *United States v. Philip Morris,* at 7, ¶ 16 (Master Rule 7.1/56.1 St. Exhibit 5)

TATEL, Circuit Judge, dissenting.

Congress passed the Organized Crime Control Act of 1970, which included RICO, "to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *United States v. Turkette,* 452 U.S. 576, 589, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) (quoting Pub.L. No. 91-452, 84 Stat. 922, 923 (1970)). Through this lawsuit, the United States seeks to end what it perceives as rampant racketeering violations within the tobacco industry. Specifically, the government offers voluminous evidence, which we must view in the light most favorable to it, *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (stating that at summary judgment the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor"), that Philip Morris, Altria Group, R.J. Reynolds, Brown & Williamson, Lorillard, BATCo, and Liggett have engaged in a half century of deceptive practices to the detriment of the health – and lives – of their customers. Acting both individually and in concert through collective agreements and jointly funded organizations like the Council for Tobacco Research and the Tobacco Institute (also defendants), these companies publicly defended smoking as both harmless and nonaddictive despite knowing from internal research that it was neither. In their advertising campaigns the companies targeted young people, who "often lack the experience, perspective,

and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), despite publicly claiming otherwise.

The government alleges that during the course of this behavior, the defendants committed over ninety racketeering violations between RICO's 1970 effective date and the government's 1999 complaint. Significantly for this appeal, the government further claims that absent court intervention and despite the master settlement agreement between the tobacco companies and the states, the companies are likely to continue their deceptive practices and commit further racketeering violations in the future. The government's claim regarding likely future conduct rests not only on the companies' alleged history of deceptive activities, but also on record evidence that the companies continue making their misleading statements about both the health consequences of smoking and the addictive nature of nicotine, as well as persisting in their marketing efforts aimed at young people. The government asks the district court to enjoin the tobacco companies from future unlawful conduct and to order them to disgorge the profits they have earned due to their racketeering violations since RICO's effective date – profits the government estimates amount to $280 billion.

In now holding that district courts may never order disgorgement as a remedy for RICO violations, this court ignores controlling Supreme Court precedent, disregards Congress's plain language, and

creates a circuit split – all in deciding an issue not properly before us. Because the tobacco companies ask us to address an issue not fairly included in the certified order and not presented at that time to the district court, I would dismiss this interlocutory appeal. Were it appropriate to reach the merits, I would uphold the district court's denial of summary judgment on either of two grounds. First, unless "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity," district courts may grant any equitable relief. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946). Because under a fair application of Supreme Court precedent, *see id.* at 398-403, 66 S.Ct. 1086, no such inference can be drawn about RICO, I would conclude that the district court has authority to order disgorgement. Alternatively, even if RICO's phrase "prevent and restrain violations," 18 U.S.C. § 1964(a), limits the district court's equitable jurisdiction, I would still uphold the denial of summary judgment because the government has presented evidence that disgorgement will accomplish just that purpose in this case.

I.

Under 28 U.S.C. § 1292(b), if a district court "shall be of the opinion that [an] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," it

may certify the order for interlocutory review, and the court of appeals "may thereupon, in its discretion, permit an appeal to be taken from such order." Section 1292(b) establishes a "two-tiered arrangement." *Swint v. Chambers County Comm'n,* 514 U.S. 35, 47, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). Congress "chose to confer on district courts first line discretion to allow interlocutory appeals," *id.*, and "even if the district judge certifies the order under § 1292(b), the appellant still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment," *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 475, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (internal quotation marks and citation omitted). In accepting this interlocutory appeal, this court not only (at the least) pushes the bounds of its jurisdiction, but also exercises its discretion on behalf of defendants whose litigating tactics leave much to be desired.

A.

In 2000, the tobacco companies – usually referred to in this opinion as "Philip Morris" – filed a motion to dismiss, arguing (among other things) that "disgorgement . . . is never available under a civil RICO count." *See United States v. Philip Morris Inc.,* 116 F.Supp.2d 131, 150 (D.D.C.2000). Denying that motion, the district court held that disgorgement could be available under 18 U.S.C. § 1964(a), but did not

address whether disgorgement would be available in this particular case. *See id.* at 150-52. Philip Morris never sought certification of that order, though it could have done so at any time after the order's issuance. *See* Fed. R. App. P. 5(a)(3) (providing that the time for filing an appeal runs from when the district court amends the order to include certification, not from the issuance of the actual order); 16 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3929 (2d. ed. 1996) ("This latitude [in Rule 5(a)] makes it possible to employ § 1292(b) with some precision, deferring the question of appeal until it is clear that prompt appeal is apt to be useful.").

In 2004, Philip Morris sought summary judgment regarding the government's request for disgorgement in this case. Contrary to the court's statement, *see* majority op. at 1193, Philip Morris neither reargued the position it took in 2000 nor asked the district court to revisit its 2000 decision. Philip Morris's only reference to its prior position came in a one-sentence footnote: "As noted previously, Defendants respectfully disagree with the Court and maintain that disgorgement in any fashion is unavailable to the Government in a civil RICO action." Defs.' Br. in Supp. Mot. Partial Summ. J. at 6 n.4. Instead, Philip Morris urged the court to grant its motion for summary judgment for two primary reasons. First, relying on *United States v. Carson*, where the Second Circuit held that district courts may order disgorgement as a RICO remedy only where the gains "are being used to fund or promote the illegal conduct, or

constitute capital available for that purpose," *id.* at 20 (quoting *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir.1995)), Philip Morris claimed that 18 U.S.C. § 1964(a) "limits disgorgement to the amount of ill-gotten gains that remain available to defendants to fund future RICO violations," *id.* Philip Morris further argued that "the Government deliberately has refused to develop the proof properly required under *Carson* "and this in turn "requires dismissal of the Government's disgorgement claim." *Id.* at 25. Second, Philip Morris asserted that the government's disgorgement model fails as a matter of law to reasonably approximate the defendants' ill-gotten gains.

The district court rejected both arguments and denied summary judgment to Philip Morris. *United States v. Philip Morris USA, Inc.*, 321 F.Supp.2d 72 (D.D.C.2004). Interpreting section 1964(a) more broadly than had the Second Circuit, the court concluded that it could order disgorgement in situations besides those identified in *Carson*. *Id.* at 77-79. Unsurprisingly, the district court did not revisit its 2000 decision, observing only (in a footnote) that this decision had held "that disgorgement is a permissible remedy under Section 1964(a)." *Id.* at 76 n. 7. The district court also rejected Philip Morris's contention regarding the government's disgorgement model. *Id.* at 81-82.

Philip Morris then asked the district court to certify its 2004 order under section 1292(b). In its certification request, Philip Morris did not reassert its legal argument from 2000. Instead, it stated that

"[w]hether the *Carson* standard applies to the Government's disgorgement claim is clearly a controlling question of law. . . . If the Government is wrong, and *Carson* applies, nothing is left of its claim in this case." Def's Br. Supp. Mot. Certify Order # 550 for Interloc. App. at 4.

The district court agreed that a controlling question of law existed as to whether "the disgorgement allowed under 18 U.S.C. § 1964(a) is limited to those ill-gotten gains which are 'being used to fund or promote the illegal conduct or constitute capital available for that purpose.'" *United States v. Philip Morris USA, Inc.*, No. 99-2496, slip op. at 2-4, 2004 WL 1514215 (D.D.C. June 25, 2004) (quoting *Carson*, 52 F.3d at 1182). Although in its 2004 order the district court had rejected *Carson*'s interpretation of section 1964(a), it found substantial ground for difference of opinion on this issue, explaining that "it is obvious that the arguments to the contrary in *Carson* are neither insubstantial nor frivolous," and certified the 2004 order. *Id.* at 4, 7.

In its initial petition urging this court to accept the interlocutory appeal, Philip Morris never raised the broader question the district court had addressed in 2000, i.e., whether disgorgement is ever available under section 1964(a). Instead, Philip Morris focused on the narrower issue actually raised in its 2004 motion for summary judgment, arguing that the district court had erred in rejecting *Carson*'s interpretation of section 1964(a) and claiming that "[i]f this Court agrees with the Second Circuit in *Carson*, its decision

on appeal would dispose of the Government's disgorgement claim." Emergency Pet. for Permission to Appeal an Order at 9. The government opposed Philip Morris's section 1292(b) petition, arguing that a host of factual issues would require resolution regardless of whether this court adopted *Carson*'s or the district court's interpretation of section 1964(a) and thus that "interlocutory appeal would not materially advance the termination of this litigation." Resp. in Opp'n to Emergency Pet. at 15.

Responding to the government's opposition, Philip Morris suddenly changed tack and brought in play the issue decided in 2000. Philip Morris wrote:

> The district court rejected [the government's] argument [that an interlocutory appeal would not materially advance the litigation's termination] as a reason not to permit an appeal, and this Court should as well.
>
> First, and most obviously, if this Court reverses the district court's ruling that 'disgorgement is a permissible remedy under section 1964(a),' (Summary Judgment Order at 8 n.7), then the Government's $280 billion claim is precluded as a matter of law.

Reply to Emergency Pet. for Permission to Appeal an Order at 5. This entirely disingenuous statement conveyed the impression that the district court had *ruled* on this broader issue in the certified 2004 order rather than simply mentioning its 2000 decision. Moreover, by placing this statement under the heading "The District Court Properly Determined That an

Appeal From Its Order Would Materially Advance This Litigation," *id.*, Philip Morris insinuated that the district court had certified *this* issue to this court as opposed to the narrower question actually resolved in the 2004 order. The government, of course, had no opportunity to correct these misrepresentations, and a motions panel accepted Philip Morris's appeal, expressly leaving the merits panel free to reconsider and dismiss the appeal. *In re Philip Morris USA, Inc.*, No. 04-8005 (D.C.Cir. July 15, 2004).

Philip Morris's opening brief on the merits reveals the scope of its bait and switch. The brief devotes forty pages to the issue decided in the 2000 order and only seven to the issues decided in the certified 2004 order. In response, the government urges us to dismiss the appeal entirely, suggesting that we lack jurisdiction over the issue decided in the 2000 order and observing that "Defendants' tactics subvert the mechanism for appeal established by section 1292(b)." Appellee's Br. at 45-46.

B.

As the foregoing discussion indicates, Philip Morris asks us – and the court now agrees – to decide an issue (1) not briefed in the motion leading up to the certified order, (2) not decided in the district court's opinion accompanying the certified order, (3) not raised by Philip Morris in its request for certification, (4) not discussed in the order granting certification, (5) not raised by Philip Morris in its section

1292(b) petition before this court, and (6) decided in an entirely different order which Philip Morris could at any time have asked the district court to certify. This presents serious questions on two separate fronts: our jurisdiction over this appeal under section 1292(b), and our general policy of declining to consider arguments not made to the district court in the motion leading to the order under appeal. Unlike the court, I cannot brush these concerns aside.

Regarding our jurisdiction under section 1292(b), the Supreme Court has made clear that an appellate court can review "any issue fairly included within the certified order" because "[a]s the text of § 1292(b) indicates, appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Yamaha Motor Corp., USA v. Calhoun,* 516 U.S. 199, 205, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (holding that where the district court decided two issues in the certified order but identified only the damages issue as the controlling question of law, the court of appeals could nonetheless address the other issue). But the "court of appeals may not reach beyond the certified order to address other orders made in the case." *Id.; see also United States v. Stanley,* 483 U.S. 669, 677, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987) (holding that the court of appeals erred in addressing a claim not raised in the certified order though closely related to it). Both "[c]ommentators and courts have consistently observed that 'the scope of the issues open to the court of appeals is closely limited to the order

appealed from [and][t]he court of appeals will not consider matters that were ruled upon in other orders.'" *Stanley,* 483 U.S. at 677, 107 S.Ct. 3054 (quoting 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* § 3929 (1977)) (second and third alterations in original).

This case falls near the intersection of these commands. For all intents and purposes, Philip Morris asks us to address the 2000 order. Today's decision overturns that order. This court has jurisdiction to do this under *Yamaha* only if the issue addressed in the 2000 order is "fairly included within the certified order." Taking a broad view of "fairly included," the court concludes that because the 2004 order denies dismissal of the government's disgorgement claim, we may review (at a minimum) any basis for summary judgment that is "logically interwoven with the explicitly identified issue." *See* majority op. at 1196. This approach not only gives us jurisdiction over the issue decided by the district court in the 2000 order, but also over the district court's 2002 determination, made in denying Philip Morris's motion for a jury trial, that disgorgement is an equitable remedy rather than a legal one, *United States v. Philip Morris, Inc.*, 273 F.Supp.2d 3, 8-11 (D.D.C.2002). Indeed, although the concurrence apparently does not share this approach, *see* sep. op. at 1206 (Williams, J., concurring), the majority opinion suggests that any issue which would result in "*complete dismissal* of the Government's claim for disgorgement with prejudice" lies within our jurisdiction "regardless of the grounds

the District Court gave for its decision," *see* majority op. at 1194. By this logic, we may also have interlocutory jurisdiction to review the district court's denial of the tobacco companies' 2000 motion to dismiss, where they claimed that the government has not "adequately alleged that Defendants' racketeering activity will continue into the future," 116 F.Supp.2d at 147-50, and even the district court's denial of Liggett's 2000 motion to dismiss, where the company argued that (as to it) the government could not show two elements required for a RICO claim, *id.* at 152-53. Because victory for the tobacco companies on the first issue (and, for Liggett, victory on the second) could also trigger dismissal of the government's disgorgement claims, under the court's theory our interlocutory jurisdiction may extend to these issues as well.

The court's approach is problematic in several respects. Most significantly, it curtails the district court's section 1292(b) certification role. In this case, the district court had neither an opportunity to exercise "first line discretion to allow interlocutory appeal [ ]," *Swint,* 514 U.S. at 47, 115 S.Ct. 1203, on the broader issue resolved in its 2000 order nor notice that Philip Morris would raise this issue with us. In future cases, district courts will lose their flexibility to certify discrete issues for review, since the certification of one order may give this court jurisdiction over all sorts of prior orders. Today's situation illustrates this: under the court's theory, we have jurisdiction in this interlocutory appeal to review at a

minimum two prior orders, neither of which Philip Morris sought to certify. Moreover, by reducing the opportunity for tailored review, the court's jurisdictional theory threatens this circuit with interlocutory overload. Parties who persuade us to accept an interlocutory appeal may feel encouraged to raise any or even all issues decided in prior orders that fall within our newfound jurisdiction especially since, according to the court, issues raised in prior orders are "preserved" for section 1292(b) purposes, *see* majority op. at 1196, and not simply for the purpose of appeal after final judgment.

By contrast, no harm of consequence would result from holding, as I would, that the only issues "fairly included" within a certified order are those decided in the district court's accompanying memorandum – exactly the situation with the issue reached by the Supreme Court in *Yamaha,* 516 U.S. at 203-05, 116 S.Ct. 619. There, the Court found "fairly included" an issue that the district court had resolved in the same opinion in which it decided the issue identified as the controlling question of law, *see Calhoun v. Yamaha Motor Corp., USA,* No. 90-4295, 1993 WL 216238 (E.D.Pa. June 22, 1993). While the Court did not explicitly rely on this point, it is relevant to determining whether *Yamaha*'s "fairly included" language stands for the proposition that appellate courts have interlocutory jurisdiction over all possible bases for reversing a summary judgment denial (as my colleagues read it) or only over bases which the district court considered and resolved in this denial (as I read it).

My approach, moreover, respects the Court's instruction in *Stanley* that we should "not consider matters that were ruled upon in other orders." 483 U.S. at 677, 107 S.Ct. 3054 (citation omitted); *cf. Briggs v. Goodwin,* 569 F.2d 10, 25 (D.C.Cir.1977) (noting that any possible justification for addressing "all other issues relevant to the result reached by [a certified] order" would "be substantially diminished . . . where the order certified for appeal is a separate order from the one [containing the other issues]"); *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin,* 135 F.3d 837, 840 (2d. Cir.1998) (finding that the certified order referred to rather than incorporated a prior order and concluding that no interlocutory jurisdiction existed over the issue decided in the prior order). It is thus hardly surprising that the court today points to no case in which an appellate court has exercised interlocutory jurisdiction over an issue decided in a different order from the one under certification. True, under my approach a party seeking an interlocutory appeal on a matter split across two orders would need to seek certification of both orders to bring the matter fully to this court. But that seems a small burden. If the party fails to make this effort (as in this case) and we conclude that it would be inappropriate to address only the issues raised in the certified order (as I would here), then we have discretion under section 1292(b) to refuse to permit the interlocutory appeal altogether – a point this court overlooks.

In addition to resting on a dubious interpretation of section 1292(b), the court's decision to review the broader issue runs counter to this circuit's general rules regarding waiver. Parties may raise here only those arguments they presented to the district court in their papers seeking (and opposing) the order under review, since only in exceptional circumstances will we consider an argument not made to the district court. *See United States v. British Am. Tobacco (Invs.) Ltd.*, 387 F.3d 884, 887-88 (D.C.Cir.2004) (finding waiver based on a party's failure to appear and defend a privilege claim in the proceedings resulting in the interlocutory appeal, even though the party had asserted the privilege in a related proceeding in the same case); *see also id.* at 892 (refusing to consider argument not raised below) (citing *United States v. Hylton*, 294 F.3d 130, 135-36 (D.C.Cir.2002)). Here, as discussed earlier, Philip Morris never argued the broader issue in the relevant pleadings; a sentence-long footnote stating "respectful disagreement" is not an argument, particularly when offered in such a cursory fashion. *Cf., e.g., Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C.Cir.2001) (per curiam) (observing that a "litigant does not properly raise an issue by addressing it in a 'cursory fashion' with only 'bare-bones arguments' "); *Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 39 (D.C.Cir.1997) (declining to address argument made in a footnote). Although it is true, as the court points out, that in the two just-cited cases the issues were apparently never raised at an earlier stage, here we are reviewing not the entire case but only the

certified 2004 order, which sets the bounds of both our jurisdiction and waiver doctrine. Moreover, while we sometimes make exceptions to our waiver rules, I would not do so here given Philip Morris's questionable tactics. Even under my colleagues' jurisdictional theory, only by exercising our discretion to accept an argument not raised in the district court – and further exercising our discretion to accept the interlocutory appeal – does the broader issue stand before us.

In sum, whether viewed in terms of jurisdiction or waiver, only Philip Morris's narrower challenge is properly before us. True, this means we should dismiss the appeal altogether, as it makes little sense to decide the narrower question at this time when the broader question might be appealed later. But Philip Morris itself created this problem. It had several ways it could properly have brought the broader issue to our attention. In its 2004 motion for summary judgment, it could have reargued the broader question and asked the district court to reconsider its decision; the district court's denial of reconsideration would have brought the issue fairly into the challenged order. Even more appropriately, Philip Morris could have asked the district court to certify both the 2000 and 2004 orders and candidly explained that it wished this court to review the earlier order as well. Either way, the district court, having fair notice that Philip Morris wanted to raise both issues with us, could have performed its section 1292(b) gatekeeping function. Taking neither approach, Philip Morris

instead not only jumped the fence at the district court level, but also circumvented our own screening process by waiting until after the government's opposition to raise the broader issue with the motions panel. This court should not be rewarding such tactics by exercising its discretion to hear this appeal.

I would therefore dismiss the interlocutory appeal. I reach this conclusion reluctantly because I certainly understand how hearing this interlocutory appeal could be helpful to Judge Kessler, who is presiding over a long and difficult trial. In my view, however, preserving section 1292(b)'s integrity and discouraging the kind of litigating tactics reflected in this record far outweigh the efficiency that hearing this interlocutory appeal might produce in this concededly complex case.

But the court disagrees with my position. The appeal stands before us, so in the following sections I exercise a dissenter's prerogative to address the merits. *See, e.g., Gratz v. Bollinger,* 539 U.S. 244, 291, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (Souter, J., dissenting); *Arizona v. Evans,* 514 U.S. 1, 18, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995) (Stevens, J., dissenting); *Larson v. Valente,* 456 U.S. 228, 258, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (White, J., dissenting).

II.

Like my colleagues, I begin with the structure and language of RICO's remedial provisions. RICO authorizes criminal penalties and civil remedies

against those engaging in patterns of racketeering behavior. 18 U.S.C. § 1963 sets out the criminal penalties: guilty persons shall "be fined under this title or imprisoned . . . or both, and shall forfeit to the United States" any illegally acquired interest. Section 1964 provides for the civil remedies. At issue in this case is subsection (a), which states:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Another subsection, § 1964(c), authorizes injured persons to sue RICO violators for treble damages and to recover attorneys' fees. Finally, Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes," Pub.L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (codified in a note following 18 U.S.C. § 1961) – a provision that, if it "is to be applied anywhere, [should be applied] in § 1964, where RICO's remedial purposes are most evident," *Sedima*,

S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 n. 10, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

The government argues that district courts have authority to order any remedy, including disgorgement, within their inherent equitable powers. More narrowly, the government argues that assuming the district courts may only impose equitable remedies for the purpose of keeping defendants from committing RICO violations, disgorgement – by reducing the incentives for the tobacco companies to violate RICO in the future – will accomplish that purpose in this case. These two distinct arguments present very different consequences for district courts: under the first theory, courts may order disgorgement any time they find the remedy necessary to ensure complete relief, while under the second theory courts may order disgorgement only to prevent ongoing or future violations. In this case, the district court accepted only the second argument. *See* 321 F.Supp.2d at 74-80. The court today rejects both.

A.

In dismissing the argument that district courts may impose any equitable remedy for RICO violations, the court distinguishes – unconvincingly, in my view – the two Supreme Court cases relied on by the government, *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960). I believe these two

cases control this case and compel the conclusion that district courts may impose any equitable remedy for RICO violations.

In *Porter,* the Supreme Court considered whether a district court had authority to order restitution in a suit brought by the Price Control Administrator against a landlord who had violated the Emergency Price Control Act (EPCA) by charging too much rent. The act contained no specific provision for restitution or disgorgement, but – like RICO – authorized a broad array of other remedies, both criminal and civil. On the criminal side, offenders could be fined and imprisoned. EPCA, § 205(b)-(c), 56 Stat. 23, 33 (1942). On the civil side, injured individuals could sue for treble damages plus attorneys' fees, and if they were not entitled to sue or the statutory period for their suit had passed, the Administrator could sue for the same remedy on behalf of the United States. *Id.* § 205(e), 56 Stat. at 34, *as amended by* Stabilization Extension Act of 1944, § 108(b), 58 Stat. 632, 640-41. The Administrator could also sue to suspend a violator's license. *Id.* § 205(f)(2), 56 Stat. at 35.

In the section most at issue in *Porter,* the act further provided that

> [w]henever in the judgment of the Administrator any person has engaged or is about to engage in [violations of the act], he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the

> Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Id. § 205(a), 56 Stat. at 33. Although this section clearly authorized injunctions aimed at future behavior, it made no express provision for restitution and did not, contrary to my colleagues' suggestion, explicitly "grant[ ] general equitable jurisdiction" to the district courts, *see* majority op. at 1197. Indeed, in *Porter,* the Eighth Circuit had held that district courts were without authority to order restitution as a remedy for violations of the EPCA. *Bowles v. Warner Holding Co.,* 151 F.2d 529, 532 (8th Cir.1945) (concluding that the district court had no authority to order restitution because "[i]t is well settled 'That where a statute creates a right and provides a special remedy, that remedy is exclusive' ") (citations omitted).

The Supreme Court reversed. Discussing "the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act," 328 U.S. at 397-98, 66 S.Ct. 1086, the Court concluded – and I quote at length since the language is so critical to the disposition of this case – that

> [s]uch a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since

> the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id. at 398, 66 S.Ct. 1086 (citations omitted). The Court concluded that because the EPCA, despite the very detailed and specific nature of the authorized remedies, did not rule out restitution by a "necessary and inescapable inference," the district court could order restitution even if not expressly authorized by the statute. *See id.* at 398-400, 66 S.Ct. 1086; *see also Mitchell,* 361 U.S. at 291, 80 S.Ct. 332 (discussing *Porter*).

Indeed, the Court further suggested that restitution could be considered an "other order" to enjoin or enforce compliance within section 205(a) in either of two ways. First, it could be "considered as an

equitable adjunct to an injunction decree" since "where, as here, the equitable jurisdiction of the district court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." 328 U.S. at 399, 66 S.Ct. 1086. Second, restitution could "be considered as an order appropriate and necessary to enforce compliance with the Act" since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.* at 400, 66 S.Ct. 1086. The Court then remanded for the district court to "exercise the discretion that belongs to it" and decide whether to order restitution. *Id.* at 403, 66 S.Ct. 1086.

Porter was not unanimous. "It is not excessive to say that perhaps no other legislation in our history has equaled the Price Control Acts in the wealth, detail, precision and completeness of its jurisdictional, procedural and remedial provisions," *id.* at 404, 66 S.Ct. 1086, wrote Justice Rutledge in dissent. "The scheme of enforcement was highly integrated, with the parts precisely tooled and minutely geared." *Id.* "Congress could not have been ignorant of the remedy of restitution. It knew how to give remedies it wished to confer." *Id.* at 405, 66 S.Ct. 1086. "[E]ven courts of equity may not grant relief in disregard of the remedies specifically defined by Congress." *Id.* at 408, 66 S.Ct. 1086.

The court's opinion today sounds a lot like the *Porter* dissent. The court observes that the language

of section 1964(a) – a court has "jurisdiction to prevent and restrain violations" – does not explicitly open the door to all of equity, but neither did EPCA section 205(a) (a court may issue orders "enjoining" violations or "enforcing compliance"). The court asserts that reading full equitable jurisdiction into RICO will render section 1964(a)'s language largely meaningless, but *Porter* rejected just this concern with regard to EPCA section 205(a). The court emphasizes that RICO "already provides for a comprehensive set of remedies," majority op. at 1200, but the EPCA had at least as comprehensive a remedial structure. The court further points out that should restitution be available, the government could obtain duplicative recovery (given RICO's criminal forfeiture provisions) and also escape the applicable statutes of limitations, but the *Porter* majority dismissed similar concerns, 328 U.S. at 401-02, 66 S.Ct. 1086; *see also id.* at 406-08, 66 S.Ct. 1086 (Rutledge, J., dissenting). Finally, the court attempts to distinguish *Porter* on the grounds that the EPCA had a different policy goal than RICO (preventing inflation rather than seeking to eradicate organized crime), but this has no effect on *Porter*'s essential holding that "the court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances," *see id.* at 398, 66 S.Ct. 1086. In sum, the court offers no basis for concluding that RICO's structure and language get the statute past *Porter*'s high bar for finding by a "necessary and inescapable inference"

that Congress intended to empower district courts to order only limited equitable relief.

Nor does Philip Morris point to anything in RICO's legislative history that creates such a "necessary and inescapable inference." Only one remark even gives me pause. The Senate Committee report stated, "Subsection [1964] (a) contains broad remedial provisions for reform of corrupted organizations. Although certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons." S.Rep. No. 91-617, at 160 (1969); *accord* H. Rep. No. 91-1549, at 57 (1970). The second part of this "limit" – requiring due provision for the rights of innocent persons – poses no concern, for it describes equity rather than constricts it. *See, e.g., Holly v. Domestic & Foreign Missionary Soc'y,* 180 U.S. 284, 295, 21 S.Ct. 395, 45 L.Ed. 531 (1901) ("[A] court of equity will not transfer a loss that has already fallen upon one innocent party to another party equally innocent."). But the first part of this "limit" – that remedies should accomplish the aim of removing the corrupting influence – does more than simply restate an equitable principle. Suggesting that the remedies must remove the corrupting influence, it allows one to infer that remedies may accomplish *only* this aim. But that inference is, to use *Porter*'s words, neither "necessary" nor "inescapable." One could also infer that remedies must accomplish this aim as a lower limit (i.e., no corrupting influence may

remain), but may also accomplish other aims – just as remedies must make due provision for the rights of the innocent, but may presumably do much more. Indeed, this reading comports with how RICO's sponsor, Senator McClellan, described the bill when he introduced it: the "ability of our chancery courts to formulate a remedy to fit the wrong is one of the greatest benefits of our system of justice. This ability is not hindered by the bill." 115 Cong. Rec. 9567 (1969).

Mitchell, the second Supreme Court decision the government relies on, considered whether district courts could order restitution of wages lost from unlawful discharge in suits brought by the Secretary of Labor under section 17 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 217 (1960). Relying on *Porter,* the Court concluded that where the statute provided that "the district courts are given jurisdiction . . . for cause shown, to restrain violations" of the act, 29 U.S.C. § 217, district courts had full equitable powers, 361 U.S. at 291-95, 80 S.Ct. 332; *see also id.* at 289, 80 S.Ct. 332. Reaffirming *Porter's* strong presumption in favor of finding equitable relief fully available, the Court stated: "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.'" *Id.* at

291-92, 80 S.Ct. 332 (quoting *Clark v. Smith,* 38 U.S. (13 Pet.) 195, 203, 10 L.Ed. 123 (1839)) (omission in original); *see also Califano v. Yamasaki,* 442 U.S. 682, 704-06, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) (using the *Porter* presumption to conclude that district courts could order injunctive relief not explicitly authorized by the Social Security Act). The *Mitchell* Court thought it insignificant that because both the aggrieved employees and the Secretary could seek lost wages in actions at law under FLSA section 16, 29 U.S.C. § 216 (1960), duplicative recovery might occur. 361 U.S. at 292-93, 80 S.Ct. 332. *But see id.* at 303, 80 S.Ct. 332 (Whittaker, J., dissenting) (concluding that the statutory scheme "seems plainly to show that Congress intended by s 16(c) to allow recovery of unpaid minimum wages and overtime compensation at the instance of the Secretary only in an action at law, brought under that subsection, and triable by a jury").

Mitchell reinforces the proposition that district courts may order any equitable relief in civil RICO suits brought by the government. My colleagues suggest that in "the RICO Act, Congress provided a statute granting jurisdiction defined with the sort of limitations not present in the FLSA." Majority op. at 1199. The only jurisdictional hook in the FLSA's text, however, was its language: "the district courts are given jurisdiction . . . for cause shown, to restrain violations" of the act, 29 U.S.C. § 217. If this language opens the door to all equitable relief, then RICO's language – "[t]he district courts . . . shall have

jurisdiction to prevent and restrain violations" – certainly does the same. And if the possibility of duplicative recovery did not circumscribe the district court's equitable authority under the FLSA, then neither should that possibility under RICO do so.

Not surprisingly, in the wake of *Mitchell* and *Porter,* circuit courts including this one have read general equitable jurisdiction into a variety of statutes that fail to provide explicitly for it. In *SEC v. First City Financial Corp.,* 890 F.2d 1215 (D.C.Cir.1989), we held that district courts may order disgorgement under the Security Exchange Act's sections 21(d) and (e), 15 U.S.C. § 78u(d)-(e) (1989), which provide that the district courts "shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding" compliance with the act and regulations made under it. *See* 890 F.2d at 1230 (relying on *Porter* and *Mitchell*). "Disgorgement, then, is available simply because the relevant provisions of the Securities Exchange Act of 1934, sections 21(d) and (e) . . . vest jurisdiction in the federal courts." *Id.; see also SEC v. Tome,* 833 F.2d 1086, 1096 (2d Cir.1987); *SEC v. Wash. County Util. Dist.,* 676 F.2d 218, 227 (6th Cir.1982). Other circuits have reasoned similarly in interpreting other acts. *See, e.g., FTC v. Gem Merch. Corp.,* 87 F.3d 466, 468-70 (11th Cir.1996) (applying *Porter* in holding that courts may order restitution as a remedy for violations of the Federal Trade Commission Act); *ICC v. B & T Transp. Co.,* 613 F.2d 1182, 1183-86 (1st Cir.1980) (applying *Porter* in holding that courts may order restitution as

a remedy for violations of the Motor Carrier Act, though noting that "[i]f we were writing on a blank slate, we might agree with the district court that the language of the Motor Carrier Act cannot justify" the remedy of restitution); *CFTC v. Hunt*, 591 F.2d 1211, 1221-23 (7th Cir.1979) (applying *Porter* in holding that courts may order disgorgement as a remedy for violations of the Commodity Exchange Act).

Instead of following *Porter* and *Mitchell*, the court relies on a later Supreme Court decision, *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996). In *Meghrig*, the Supreme Court considered whether private citizens could seek restitution under the Resource Conservation and Recovery Act (RCRA) for the cost of having cleaned up a prior landowner's toxic waste. The statute provided that the "district court shall have jurisdiction . . . to restrain any person who has contributed or who is contributing" to waste problems, "to order such person to take such other action as may be necessary, or both." *Id.* at 482 n. *, 116 S.Ct. 1251 (quoting 42 U.S.C. § 6972(a)). The Court held that it was "apparent from the two remedies described . . . that RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts." *Id.* at 484, 116 S.Ct. 1251. While not explicitly defining the limits of the two remedies described, the court suggested that these remedies should be equated with prohibitory and mandatory injunctions. *Id.* Moreover, relying in part on the fact that an analogous statute expressly authorized

damages, the Court concluded that "neither remedy . . . contemplates the award of past cleanup costs, whether these are denominated 'damages' or 'equitable restitution.'" *Id.* at 484-85, 116 S.Ct. 1251. According to the Court, it "is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* at 488, 116 S.Ct. 1251 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 14-15, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981)).

The *Meghrig* Court noted that in arguing that the district court had inherent authority to award equitable remedies, the plaintiffs relied on *Porter* and its progeny. *Id.* at 487, 116 S.Ct. 1251. Without expressly distinguishing those cases, the Court explained that "the limited remedies described in [RCRA], along with the stark differences between the language of that section and the cost recovery provisions [of the analogous statute], amply demonstrate that Congress did not intend for a private citizen to be able to undertake a cleanup and then proceed to recover its costs under RCRA." *Id.* Notably for our purposes, *Meghrig* did not overrule *Porter.* Indeed, even after *Meghrig,* the Supreme Court has cited *Porter* for the proposition that "we should not construe a statute to displace courts' traditional equitable authority absent . . . an 'inescapable inference' to the contrary." *Miller v. French,* 530 U.S. 327, 340, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000); *see also United*

States v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 496, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001).

At one level, reconciling *Meghrig* with *Porter* and *Mitchell* is difficult. *Meghrig* suggests that "to restrain" only authorizes prohibitory injunctions. By contrast, *Mitchell* holds that this language imposes no limit on the district court's full equitable powers. *Meghrig*, relying on a version of the canon *expressio unius est exclusio alterius*, observes that courts should be "chary" in reading remedies into a statute which expressly provides for other remedies. By contrast, *Porter* indicates that in the context of equity jurisdiction, the general *expressio unius* canon gets inverted, meaning that district courts possess all equitable powers unless the statute "inescapabl[y]" provides to the contrary. *Cf. Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 18-20, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974) (discussing these competing canons).

These tensions cannot be dealt with simply by dismissing *Porter* and *Mitchell*. *Meghrig* not only left both cases intact, but also suggested that the "limited remedies" in RCRA, together with the "stark differences" between RCRA and the analogous statute, explain the different outcomes. Given this, our responsibility is to follow the Supreme Court's oft-cited instruction that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of

overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *see also Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (reaffirming this requirement).

In my view, *Porter* and *Mitchell,* not *Meghrig,* "directly control" this case. Several reasons support this conclusion, and nothing points the other way. First, RICO's statutory scheme resembles the EPCA more than the RCRA. Both RICO and the EPCA stand alone in grappling with a broad social issue, whereas the RCRA had a closely related statute on which the Court in *Meghrig* relied heavily. Second, as in both *Porter* and *Mitchell,* the government brought the suit rather than a private party like the *Meghrig* plaintiff, and *Porter* makes clear that district courts may have "even broader and more flexible" equitable powers where the public interest is involved, 328 U.S. at 398, 66 S.Ct. 1086. This point has particular traction if the government is the only party that may seek equitable relief under RICO. *See Religious Tech. Ctr. v. Wollersheim,* 796 F.2d 1076, 1083-89 (9th Cir.1986) (holding that equitable relief under RICO is available only to the government). *But see Nat'l Org. for Women, Inc. v. Scheidler,* 267 F.3d 687, 695-700 (7th Cir.2001) (holding that private plaintiffs can seek equitable relief under RICO), *rev'd on other grounds,* 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003). Finally, *Meghrig*'s suggestion that "restrain" in the RCRA refers only to prohibitory injunctions cannot apply to section 1964(a), since that section explicitly

authorizes other remedies – e.g., divestment – to "prevent and restrain" RICO violations. For these reasons, in determining whether the phrase "prevent and restrain" limits the district court's equitable powers, I think it makes more sense to look to *Porter* and *Mitchell,* not *Meghrig.*

The court "[r]ead[s] *Porter* in light of" the statement in *Kokkonen v. Guardian Life Insurance Co.,* 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), that "'[f]ederal courts are courts of limited jurisdiction'" and "'possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.'" Majority op. at 1197. But "'[j]urisdiction,' it has been observed, 'is a word of many, too many, meanings.'" *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (citation omitted). *Kokkonen* simply makes the unremarkable point that federal courts have subject-matter jurisdiction over cases only if the Constitution or Congress so provides, 511 U.S. at 377, 114 S.Ct. 1673, and the Supreme Court has since clarified that it is "unreasonable" to apply subject-matter jurisdiction principles where a statute uses the term jurisdiction "merely [in] specifying the remedial *powers* of the court," *Steel Co.*, 523 U.S. at 90, 118 S.Ct. 1003.

Finally, while Congress modeled section 1964(a) on the antitrust laws, *see* 115 Cong. Rec. 9567 (1969) (statement of Sen. McClellan); *see also* 15 U.S.C. § 4 (the "district courts . . . are invested with jurisdiction to prevent and restrain violations"); *accord* 15 U.S.C.

§ 25, I disagree with Philip Morris that the Supreme Court's antitrust decisions provide useful guidance as to whether the phrase "prevent and restrain" limits the equitable remedies available to district courts. On the one hand, the Court once ignored, though did not explicitly reject, an invitation by Justice Douglas to apply *Porter* to antitrust actions. *See United States v. Nat'l Lead Co.*, 332 U.S. 319, 366-67, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947) (Douglas, J., dissenting in part); *cf. United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333, 72 S.Ct. 690, 96 L.Ed. 978 (1952) (emphasizing that in antitrust actions the purpose of injunctive relief is to "forestall future violations"); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-47, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (declining to fashion and apply a common law right of contribution in the antitrust context). On the other hand, some antitrust cases suggest that courts may impose equitable remedies beyond those intended merely to stop future violations from occurring. *E.g., United States v. Crescent Amusement Co.*, 323 U.S. 173, 189, 65 S.Ct. 254, 89 L.Ed. 160 (1944) (although the district court ordered a remedy said to "exceed any reasonable requirement for prevention of future violations," the "Court has quite consistently recognized in this type of Sherman Act case that the government should not be confined to an injunction against further violations. . . . Those who violate the Act may not reap the benefits of their violations"); *cf. United States v. U.S. Steel Corp.*, 251 U.S. 417, 452, 40 S.Ct. 293, 64 L.Ed. 343 (1920) (observing that the Sherman Act is "clear in its direction that the courts

of the nation shall prevent and restrain [monopolies] (its language is 'to prevent and restrain violations of' the act); but the command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions"); *Schine Chain Theatres v. United States,* 334 U.S. 110, 128, 68 S.Ct. 947, 92 L.Ed. 1245 (1948) (suggesting that "[l]ike restitution," divestment "merely deprives a defendant of the gains from his wrongful conduct" and upholding it as a remedy under the Sherman Act), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.,* 467 U.S. 752, 763 n. 8, 777, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). As these cases illustrate, antitrust precedent offers little reason to doubt the applicability of *Porter* and *Mitchell* to the case at hand.

To sum up, *Porter* and *Mitchell* rather than *Meghrig* control this case, and no "necessary and inescapable inference" limits the district court's jurisdiction in equity. If the district court concludes that the government has shown that the tobacco companies have committed RICO violations by advertising to youth despite assertions to the contrary and by falsely disputing smoking's addictive, unhealthy effects, then it may order whatever equitable relief it deems appropriate. Of course, the court must work within the bounds of equitable doctrines, recognizing defenses like laches and unclean hands, paying due regard for the rights of the innocent, and generally exercising its discretion. With these principles in mind, the district court can "do complete rather than

truncated justice," *Porter*, 328 U.S. at 398, 66 S.Ct. 1086.

B.

In addition to rejecting the government's argument that district courts may impose any equitable remedy on RICO violators, the court rejects the government's alternative, narrower argument – that even if district courts may order only remedies that "prevent and restrain" RICO violations, disgorgement can appropriately accomplish that purpose. Because the court's analysis of this argument is as flawed as its analysis of the government's broader argument, I add this discussion of the issue. In my view, the court transforms what should be a question of fact – what remedies appropriately prevent and restrain future violations – into a question of statutory interpretation in a way that disregards section 1964(a)'s plain language and ignores Supreme Court precedent recognizing the equitable flexibility of district courts.

Under section 1964(a), district courts may issue "appropriate orders" to prevent and restrain" RICO violations. "Prevent" has many meanings. The first nonarchaic one listed in *Webster's Third New International Dictionary* (1961) is "to deprive of power or hope of acting, operating, or succeeding in a purpose." "Restrain" can mean "to hold (as a person) back from some action, procedure, or course: prevent from doing something (as by physical or moral force or social pressure)" and "to limit or restrict to or in respect

to a particular action or course: keep within bounds or under control." *Webster's Third New International Dictionary* (1961).

The government offers expert testimony to the effect that a disgorgement order will deter the tobacco companies from violating RICO in the future – in the dictionary's language, it will deprive them of the hope of succeeding in benefiting from future RICO violations and hold them back from committing such violations. In essence, the government claims that the tobacco companies, having engaged in a persistent pattern of deceptive representations over decades, will be less likely to continue this illegal behavior if they must surrender their past ill-gotten profits. Treating the government's expert testimony as correct, as we must at this stage of the litigation, *see Anderson*, 477 U.S. at 255, 106 S.Ct. 2505, I think it enough to forestall summary judgment in Philip Morris's favor. Indeed, the Supreme Court has accepted just this theory of deterrence, stating in *Porter* that restitution "could be considered as an order appropriate and necessary to enforce compliance with the Act" since "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." 328 U.S. at 400, 66 S.Ct. 1086. If restitution helps enforce compliance, then we should have little doubt that disgorgement helps prevent and restrain violations.

This court does not conclude that disgorgement can never have a restraining effect on future conduct of the defendants – the only conclusion that could

justify a holding that district courts can never order disgorgement under section 1964(a). Instead, the court offers several unpersuasive reasons for its conclusion that as a matter of statutory interpretation disgorgement is not a permissible remedy under section 1964(a).

First, the court states that disgorgement "is a quintessentially backward-looking remedy." Majority op. at 1198. Although I agree that a court sitting in equity cannot order disgorgement that exceeds a defendant's past ill-gotten profits, *see Tull v. United States,* 481 U.S. 412, 424, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987) (observing that "[r]estitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant'") (quoting *Porter,* 328 U.S. at 402, 66 S.Ct. 1086), this does not mean disgorgement is always backward-looking and can never have a forward-looking effect on the defendants. The Supreme Court made this clear in *Porter,* 328 U.S. at 400, 66 S.Ct. 1086, and *Meghrig* nowhere rejects *Porter*'s conclusion that a disgorgement order can impact future conduct – indeed, there was no evidence in *Meghrig* that the defendants were likely to commit future RCRA violations, and in any event, as discussed *supra* at 1220-21, *Porter* and *Mitchell* are the cases most directly on point for our purposes.

Second, the court concludes that district courts are limited not merely by the words "prevent and restrain," but also "by those [three remedies] explicitly included in the statute" by application of the canons

noscitur a sociis and *ejusdem generis*. *See* majority op. at 1200; *cf. United States v. Thomas*, 361 F.3d 653, 659 (D.C.Cir.2004) (defining these canons). Even assuming we should apply these canons, however, they spell out nothing more than what everyone agrees on: that the only "appropriate" orders under this section are equitable ones. *See West v. Gibson*, 527 U.S. 212, 225-26, 119 S.Ct. 1906, 144 L.Ed.2d 196 (1999) (Kennedy, J., dissenting) (observing that these canons "suggest the appropriate remedies authorized by [a statute using the word 'including'] are remedies of the same nature as reinstatement, hiring, and backpay – *i.e.*, equitable remedies" and noting that "the phrase 'appropriate remedies,' furthermore, connotes the remedial discretion which is the hallmark of equity").

More important, I doubt the canons apply here at all. While the canons can prove useful where there is otherwise "no general principle in sight," *Dong v. Smithsonian Inst.*, 125 F.3d 877, 880 (D.C.Cir.1997); *see also Wash. State Dep't of Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003) (applying the canons in interpreting the last listed term of "execution, levy, attachment, garnishment, or other legal process"), here the statute provides the general principle of preventing and restraining violations. Indeed, the Supreme Court declined to use these canons altogether in interpreting a statute which gave the EEOC the power of enforcement "through appropriate remedies, including reinstatement or hiring of employees with

or without back pay," 42 U.S.C. § 2000e-16(b). *See West,* 527 U.S. at 218, 119 S.Ct. 1906 (stating that the "word 'including' makes clear that 'appropriate remedies' are not limited to the examples that follow that word"); *cf. Harrison v. PPG Indus., Inc.,* 446 U.S. 578, 588-89, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980) (declining to apply *ejusdem generis* canon where Congress used "expansive language"). I see no reason why we should do otherwise here, especially since section 1964(a) uses the even more expansive language: "including, but not limited to." Finally, *noscitur a sociis* and *ejusdem generis* should not be used to limit the types of equitable relief available to district courts given Congress's instruction that RICO "shall be liberally construed to effectuate its remedial purposes," *see supra* at 1215, one of which is preventing and restraining future violations – an aim that, far from being a "new purpose[] that Congress never intended," *see* majority op. at 1201 (quoting *Reves v. Ernst & Young,* 507 U.S. 170, 183, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993)), expressly appears in the statute's text. If an equitable remedy achieves this goal, then the statute authorizes it.

Third, the court suggests that disgorgement should be unavailable because it allows the government to achieve relief "similar in effect" to criminal forfeiture, raising concerns that the government can achieve duplicative recovery and evade the procedural safeguards girding the forfeiture provision. *See* majority op. at 1200-01. To be sure, such concerns are relevant in considering whether to infer additional

causes of action. As discussed earlier, *supra* at 1217, however, given the Supreme Court's explicit rejection of similar concerns in *Porter* and *Mitchell,* they cannot carry the day. Nor should such concerns stop a court from issuing equitable orders that accomplish the express statutory purpose of preventing and restraining RICO violations, whether the remedies are specifically listed in section 1964(a), e.g., divestment, or available as other "appropriate orders." Discussing RICO, the Supreme Court has observed that "Congress has provided civil remedies for use when the circumstances so warrant. It is untenable to argue that their existence limits the scope of the criminal provisions." *United States v. Turkette,* 452 U.S. 576, 585, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). The converse should hold as well. If an equitable remedy prevents and restrains RICO violations – one of the remedial purposes which we should liberally construe the statute to effectuate – it is untenable to claim that the existence of criminal provisions renders this remedy nonetheless beyond the scope of district court authority.

Of course, that disgorgement may sometimes serve to prevent and restrain defendants from committing RICO violations does not mean that it will always accomplish that purpose. As the district court here recognized, a court must first find that the defendants are likely to commit future RICO violations. 321 F.Supp.2d at 75-76. This is not a foregone conclusion. In *Carson,* for example, while the Second Circuit recognized that disgorgement can sometimes

serve to prevent and restrain RICO violations, it was rightly skeptical that disgorgement of the "gains ill-gotten long ago by a retiree" who had long since left the union position that he had abused in accepting kickbacks would accomplish this purpose. 52 F.3d at 1182. Assuming district courts are limited to remedies that prevent and restrain, *but see supra* Part II.A, I also share the Second Circuit's apparent conclusion that disgorgement may be ordered only to prevent and restrain *a defendant* from future RICO violations, *see* 52 F.3d at 1182. *But see Richard v. Hoechst Celanese Chem. Group,* 355 F.3d 345, 355 (5th Cir.2003) (leaving open the possibility that disgorgement might be ordered solely to deter other possible offenders). Because any remedy imposed for a solely exemplary purpose (i.e., to dissuade others from committing RICO violations) would amount to punishment, it goes beyond what Congress intended, *see* S.Rep. No. 91-617, at 81, as well as pushes the boundaries of what equity permits, *cf. Tull,* 481 U.S. at 422, 107 S.Ct. 1831. In this case, however, the government offers evidence that the defendant companies themselves are likely to commit future RICO violations by misleading the public about the health consequences of smoking and the addictive effects of nicotine, as well as by persisting in marketing to young people.

According to Philip Morris, only injunctions are "appropriate orders" under section 1964(a) because, in its view, they will always adequately prevent past lawbreakers from committing future violations,

particularly given the threat of heavy contempt penalties. Refining this point, the concurrence finds it "almost inconceivable" that disgorgement can change the incentives governing a defendant's future behavior given RICO's other provisions. *See* sep. op. at 1204 (Williams, J., concurring). The concurrence thus concludes that as a matter of law, Congress intended to exclude disgorgement from those remedies appropriate to prevent and restrain RICO violations. *See id.* at 1204-05. I think this approach is flawed in several respects.

To begin with, as noted above, *Porter* indicated that disgorgement may encourage guilty defendants to obey the law in the future. Interpreting a statute replete (like RICO) with other remedies, the Court concluded that "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains." 328 U.S. at 400, 66 S.Ct. 1086. We are without license to ignore the Supreme Court's views on this point.

Moreover, Philip Morris's suggestion that only injunctions provide "appropriate" relief under section 1964(a) not only cuts against the statute's plain language – Congress would hardly have included divestment in its list of sample remedies if it thought injunctions alone would be adequate – but also ignores the equitable flexibility the statute was designed to preserve, *see, e.g.*, 115 Cong. Rec. 9567 (1969) (statement of Sen. McClellan). Indeed, nothing in the statute requires courts to prefer contempt penalties (not explicitly named in section 1964(a)) to

disgorgement (also not explicitly named). Rather, no single remedy is always appropriate. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30, 64 S.Ct. 587, 88 L.Ed. 754 (1944)). Sometimes injunctive relief alone will make the most sense; other times, different equitable remedies or combinations of equitable remedies, perhaps including disgorgement, might prove as or more effective.

To be sure, given RICO's comprehensive remedial scheme, disgorgement orders may prove appropriate in preventing and restraining future violations only in rare circumstances. But "[i]n equity, as nowhere else, courts [should] eschew rigid absolutes," *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 n. 39, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (internal quotation marks and citation omitted), and precisely what remedy or combination of remedies, within the bounds of the equitable doctrines discussed earlier, will serve to prevent and restrain defendants from committing RICO violations is an issue of fact, not statutory interpretation. For these determinations, we must rely in the first instance not on what we appellate judges can or cannot imagine will "prevent or restrain," but on tried and true methods of fact-finding before district courts – including cross-examination

and presentation of contrary evidence. *Cf. id.* at 780, 96 S.Ct. 1251 (noting district courts' "'keener appreciation' of peculiar facts and circumstances") (citation omitted).

Finally, and again as noted earlier, record evidence in this case suggests that disgorgement will in fact "prevent and restrain" defendants from committing future RICO violations. As one of the government's experts stated, "[R]equiring defendants to pay proceeds will affect their expectations . . . about the returns from future misconduct." Appellee's App. at 813. The expert added that, even if coupled with an injunction laden with contempt penalties, disgorgement will "provide additional economic incentives to deter future misconduct" by "strengthen[ing] the credibility of existing laws" which the defendants have allegedly violated in the past. *Id.* at 814. Disagreeing, the concurrence offers its own "expert opinion" of the incentives driving the behavior of past RICO violators. *See* sep. op. at 1203-05, 1205-06. According to the concurrence, the most appropriate deterrence will stem from the "spotlight of the lawsuit," if properly "amplif[ied]" by "transparency-enhancing and prior-approval measures." *Id.* at 1205. Perhaps so, but "on summary judgment, the evidence should be viewed in favor of the nonmoving party, not," as the concurrence would have it, "the other way around." *Langon v. Dep't Health & Human Servs.*, 959 F.2d 1053, 1059 (D.C.Cir.1992) (reversing district court grant of summary judgment where that court disregarded admissible expert testimony); *see also*

Sears, Roebuck & Co. v. Gen. Servs. Admin., 553 F.2d 1378, 1381-83 (D.C.Cir.1977) (holding that district court inappropriately granted summary judgment where experts disagreed about whether certain data constituted a "trade secret" from which an intelligent competitor could gain information). At this stage of the litigation, then, we must assume that the government expert is correct and that disgorgement will "prevent and restrain" future RICO violations. Should Philip Morris offer expert testimony along the lines suggested by the concurrence, then it will be up to the district court to evaluate the competing evidence and make appropriate findings of fact. Should either party appeal, this court, unrestrained by the inferences required at summary judgment, would then review that factual determination pursuant to Rule 52's clear error standard. *See* Fed.R.Civ.P. 52 advisory committee's note (observing that judgment under this standard "differs from a summary judgment under Rule 56 in the nature of the evaluation made by the court"); *see also* 9A Wright & Miller, *Federal Practice and Procedure* § 2585 (2d. ed.1994) (noting that under Rule 52 a reviewing court need not view the evidence in the light most favorable to the appellee).

C.

In sum, were this case properly before us, I would hold, in accordance with *Porter* and *Mitchell,* that district courts have authority to order any remedy, including disgorgement, necessary to ensure complete

relief. As the concurrence points out, sep. op. at 1206 (Williams, J., concurring), my approach would create a circuit split, since *Carson* did not apply *Porter* and *Mitchell* to RICO (and, indeed, the parties do not appear to have brought these cases to the Second Circuit's attention). Even if, as *Carson* holds, district courts may only impose equitable remedies for the purpose of keeping defendants from committing RICO violations, I would still affirm the denial of summary judgment, leaving it to the district court to determine, on the basis of a fully developed record, whether disgorgement will help accomplish this purpose. I disagree with my colleagues' conclusions not because they have created a circuit split of their own by rejecting *Carson*'s holding that disgorgement may prevent and restrain RICO violations, but because they have done so by accepting an interlocutory appeal that we should not hear and by disregarding both Supreme Court precedent and section 1964(a)'s plain language.

III.

This leaves one final, distinct issue. Philip Morris claims that the government's disgorgement model fails as a matter of law to measure the tobacco companies' ill-gotten profits. Because the district court decided this issue in the certified order, it is – unlike the issue the court does resolve – properly before us. *See Yamaha*, 516 U.S. at 205, 116 S.Ct. 619.

In calculating disgorgement, the government first identifies what it calls the "Youth Addicted Population" (YAP), namely, all people who were smoking an average of at least 5 cigarettes a day at the time they turned 21. The government next calculates that from RICO's effective date in 1970 to 2001, the tobacco companies earned profits of $280 billion through sales to these people. The government arrives at this calculation by (1) determining the gross revenue from these total sales minus the direct costs (excluding overhead and taxes) and (2) adjusting for the time value of money. Philip Morris asserts that the government has failed to show that these profits are attributable to the companies' alleged RICO violations, relying on admissions by government experts that it would be "highly unlikely" to say that "nobody under the age of 21 would have ever smoked regularly . . . but for the defendants' alleged RICO violations."

Philip Morris cannot prevail on this issue at summary judgment because the government need not show that nobody under 21 would have smoked but for the RICO violations. As we held in *First City Financial,* 890 F.2d at 1229, "disgorgement need only be a reasonable approximation of profits causally connected to the violation." In *First City Financial,* we found that the district court appropriately ordered disgorgement of *all* profits on a stock sale where the defendants failed to make a material disclosure, purchased stock whose value would likely have already risen had the disclosure been made, and then

sold the stock for a killing after the undisclosed news broke. *See id.* at 1229-32. Although the government never proved that all increases in the stock's value stemmed from the violation, we rejected the defendants' argument that because the increase in price may have depended on other factors, disgorgement of all profits was "simplistic, quite unrealistic, and so *de facto* punitive." *See id.* at 1231. Noting that "[r]ules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task," we held that "the government's showing of appellants' actual profits on the tainted transactions at least presumptively satisfied" its "burden of persuasion that its disgorgement figure reasonably approximates the amount of unjust enrichment." *Id.* at 1231-32. Although recognizing that this might result in "actual profits becoming the typical disgorgement measure," we observed that "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty." *Id.* at 1232; *see also SEC v. Banner Fund Int'l,* 211 F.3d 602, 617 (D.C.Cir.2000).

Disentangling the tobacco companies' legal and illegal profits might also be a "near-impossible task." The government offers evidence that the tobacco companies not only fraudulently suggested that smoking was harmless and nonaddictive, but did so through a comprehensive, decades-long pattern of deliberate behavior. The government further offers evidence that advertising is a "very substantial influence on young people starting to smoke," *see* Appellee's App.

at 783, and that the tobacco companies committed RICO violations in advertising to young people while publicly denying that they were doing so. Under *First City Financial,* then, the government's calculations serve as a reasonable approximation: just as we permit actual profits in insider trading cases to serve as a proxy for ill-gotten gains, so too can actual profits from sales to the YAP meet the government's initial burden of reasonably approximating the tobacco companies' unlawful gains. The burden would thus shift to Philip Morris to "demonstrate that the disgorgement figure was not a reasonable approximation," 890 F.2d at 1232, and the district court would have to sort out who is right.

United States District Court,
District of Columbia.
UNITED STATES of America, Plaintiff,
and
Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans For Nonsmokers' Rights, And National African American Tobacco Prevention Network, Intervenors,
v.
PHILIP MORRIS USA, INC.,
(f/k/a Philip Morris, Inc.), *et al., Defendants.*
No. CIV.A. 99-2496(GK).

Aug. 17, 2006.

FINAL OPINION

KESSLER, District Judge.

* * *

XI. REMEDIES

A. Legal Standards Governing Remedies

Once RICO liability is established, 18 U.S.C. § 1964(a) states that:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on

> the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

In Order #550, the Court denied Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim and, in doing so, laid out the existing standard for equitable remedies under § 1964(a) which prevent and restrain RICO violations. First, the Court noted that the full scope of a court's equitable jurisdiction must be recognized and applied except where "a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction" or where there is a "clear and valid legislative command" limiting jurisdiction. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Second, the Court held that the plain language of § 1964(a) requires a showing of a reasonable likelihood of future RICO violations before entering any equitable remedies. Third, the Court noted that one of the purposes of civil remedies under § 1964(a) is "to divest the association of the fruits of its ill-gotten gains." *United States v. Turkette*, 452 U.S. 576, 585 (1981). Finally, based on the foregoing conclusions, the Court held that disgorgement prevents and restrains future RICO violations and is appropriate as an equitable civil RICO remedy.

Our Court of Appeals, in a 2-1 opinion written by Judge Sentelle, interpreted § 1964(a) to authorize only those remedies that are enumerated in the statute and equitable relief that "prevents and restrains" a defendant from engaging in future RICO violations. Accordingly, this Court is limited to ordering "remedies explicitly included in the statute," and "remedies similar in nature to those enumerated," *see United States of America v. Philip Morris, Inc.*, 396 F.3d 1190, 1200, 1197 (2005) (quotations and internal citations omitted). Finding that all examples of appropriate remedies given in the text of the statute are "aimed at separating the RICO criminal from the enterprise so that he cannot commit violations *in the future*," *id.* at 1198 (emphasis in original), and that the terms "prevent and restrain" are also "aimed at future actions," *id.* at 1199, the D.C. Circuit concluded that remedies similar in nature to those enumerated are "forward-looking remedies that are aimed at future violations," *id.* at 1198.[50]

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[50] Recently, the Tenth Circuit, without expressing an "opinion regarding whether, or in what circumstances, disgorgement is authorized under RICO" held that the presence of the term "restrain" in a statutory grant of general equity jurisdiction is not dispositive evidence of Congress's intent to limit remedies to those that are forward-looking. *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1058-1059 (10th Cir. 2006) (declining to apply the D.C. Circuit's interpretation of the term "restrain" and upholding the Supreme Court interpretation permitting disgorgement as a forward-looking remedy in cases brought under § 332(a) of the FDCA). *Rx Depot* followed virtually the same analysis of a

(Continued on following page)

Although the Government initially sought $289 billion in disgorgement in this case, Judge Sentelle's majority opinion explained that disgorgement is not an available remedy under § 1964(a) because it is not forward looking and does not separate the RICO criminal from the enterprise. The court characterized disgorgement strictly and narrowly as a "backward-looking remedy focused on remedying the effects of past conduct to restore the status quo." *Id.* at 1198. Judge Sentelle's opinion distinguished between acting to "prevent and restrain" and acting to "discourage," and concluded that the general deterrence created by disgorgement "insofar as it makes RICO violations unprofitable" may not necessarily "prevent and restrain" future RICO violations. *Id.* at 1200. Consequently, the court found that disgorgement is not a forward looking remedy aimed at future violations, and therefore is not similar to those enumerated in § 1964(a). Additionally, because the court determined that disgorgement is "aimed at separating the criminal from his prior ill-gotten gains" and not intended to "separat[e] the criminal from the RICO enterprise to

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court's equitable powers to "restrain" violations as this Court did in Order #550, relying heavily on *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) and concluding that disgorgement is allowed under the Federal Food Drug, and Cosmetic Act, which states that "district courts . . . shall have jurisdiction, for cause shown to restrain violations." *Id.*

prevent future violations . . . [disgorgement] may not be properly inferred from § 1964(a)." *Id.* at 1200.[51]

Accordingly, this Court may not, as a matter of law, order disgorgement and may order only such remedies as are designed to "prevent and restrain" Defendants from committing future RICO violations by separating them from the RICO enterprise.

Defendants argue that the Court can enter none of the Government's proposed remedies. First, they interpret Judge Sentelle's opinion so narrowly as to preclude any remedy other than a standard injunction restraining future RICO violations. Specifically, Defendants argue that, as a consequence of the standard which they advocate, the Court cannot consider the public interest in fashioning remedies. Second, Defendants argue that the mere existence of the MSA renders any remedy which the Court may enter duplicative and therefore inappropriate. Finally, Defendants claim that they did not receive

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[51] This determination has created a Circuit split. Contrary to the D.C. Circuit, both the Fifth and Second Circuits have adopted a standard of relief that permits disgorgement where it will prevent and restrain future RICO violations. As the Second Circuit reasoned, disgorgement may serve the goal of preventing and restraining future violations where "there is a finding that the gains are being used to fund or promote the illegal conduct, or constitute capital for that purpose." *United States v. Carson*, 52 F.3d 1173, 1182 (2nd Cir. 1995); *see also Richard v. Hoechst Celanese Chem. Group*, 355 F.3d 345, 354-355 (5th Cir. 2003) (adopting the standard set forth by the Second Circuit but denying disgorgement on other grounds).

fair notice of the remedies which the Government seeks and, therefore, the Court cannot enter any of the requested relief.

Defendants are wrong for the following reasons.

First, unless a specific remedy would countermand statutory guidance from Congress, a court must take into account the public interest when considering whether its imposition is justified. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship,* 513 U.S. 18, 26 (1994) ("As always, when federal courts contemplate equitable relief, our holding must also take account of the public interest"). Defendants argue that "any perceived benefit to the public interest cannot determine the outcome if consideration of all the equities . . . tip the balance the other way." JD Corrected Post-Trial Brief at 154-55. There is no question that a court sitting in equity may not "override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited." *United States v. Oakland Cannabis Buyers' Coop.,* 532 U.S. 483 (2001) (reversing a medical necessity exception to an injunction that was granted on grounds of public interest, where the statute clearly prohibited the behavior). However, a court may consider the public interest when determining what types of remedies to fashion pursuant to a statute's dictates. *Id.* at 498 ("To the extent the district court considers the public interest . . . the court [may evaluate] how such interest . . . [is] affected by the selection of an injunction over other enforcement mechanisms."). Thus, the Court is not precluded from

considering the public interest when it decides on the appropriateness of remedies.

Second, Defendants' claim that the existence of the MSA precludes all relief sought here is unpersuasive. Defendants rely on *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004), to argue that this Court is precluded from issuing any remedies because the MSA already enjoins Defendants' future RICO violations. However, this case is distinguishable from *Gallatin Steel* in a number of significant ways. In that case, two private citizens sought injunctive relief to prevent a steel manufacturer and slag processor from allegedly violating the Clean Air Act ("CAA") after a consent decree had been issued. The Sixth Circuit found that because the parties first entered into the consent agreement, additional injunctive relief would violate its terms and frustrate its purposes.

First, the Sixth Circuit reversed the district court's imposition of an injunction in *Gallatin Steel* because the CAA primarily serves the public interest, and "citizens acting as 'private attorneys general' to enforce the [CAA who] seek relief . . . and accordingly 'personalized' remedies are not a first priority of the Act." *Id.* at 477. In this case, however, it is the Government that seeks remedies for the harms Defendants have caused smokers and potential smokers as well as the American public as a whole. Where private citizens were seeking redress in *Gallatin Steel,* in this case, Plaintiff, the United States Government, is acting in the public interest.

Second, the court in *Gallatin Steel* rested its opinion on conditions that are not present here. First, it found that the consent decree covered all the claims brought by the parties. *Id.* at 476. In this case, however, there are remedies distinct from and additional to those that were included in the Master Settlement Agreement. Furthermore, the MSA is enforced by the states, whereas the remedies sought in this case will be enforced by the federal government. Finally, here, certain of the Defendants in this case are not even parties to the MSA and therefore not bound by its provisions.

Third, the timing of the claims brought by the citizens in *Gallatin Steel* also distinguishes that case. In *Gallatin Steel,* the district court granted plaintiffs' injunction when the consent decrees were only three months old, "meaning that the remedial requirements imposed by the decrees either had just been completed or had not been completed at all." *Id.* at 476. By contrast, the MSA was implemented in 1998, providing eight years for Defendants to meet and complete the requirements imposed by that agreement. At this point, after eight years, the weaknesses of the MSA are well known, whereas the three month period in *Gallatin Steel* was clearly insufficient. Additionally, because portions of the MSA are due to expire soon, there is no danger that the remedies sought by the Government will be duplicative of those already contained in the MSA.

Because of the distinguishing factors set forth above, this Court finds no compelling reasons to

follow the Sixth Circuit's ruling in *Gallatin Steel*. Accordingly, the Master Settlement Agreement does not preclude any remedies this Court may impose.

Finally, as a general matter, parties must be given fair notice of the remedies sought by opposing counsel. Defendants argue that they were not given sufficient notice of the remedies the Government requests. As the circuit courts have held, however, "surprise alone is not a sufficient basis for appellate reversal; appellant must also show that the procedures followed resulted in prejudice." *Socialist Workers Party v. Illinois State Bd. Of Elections*, 566 F.2d 586, 587 (7th Cir. 1977) (finding that fair notice was given where appellants received a brief from opponent seeking injunctive relief and where more formal notice would not have provided defendants with greater opportunity to alter the result); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 103 (D.C. Cir. 2001) (finding that fair notice was not given where defendants were denied a "basic procedural right to have disputed facts resolved through an evidentiary hearing"). Where injunctive relief is sought, both parties must be given an opportunity to have a remedies hearing. *See generally* Fed. R. Civ. P. 65. In *Microsoft* the court failed to allow defendants a hearing on remedies, despite their repeated requests. By stark contrast, in this action, Defendants received the Government's proposed remedies almost two months before the remedies trial and had an additional twelve days after the conclusion of the liability phase to prepare for the remedies phase. Defendants

participated in a fourteen day remedies trial which was fully briefed, and at which thirteen witnesses testified. They had a full opportunity to cross-examine all Government witnesses. Moreover, Defendants point to no specific witness they were unable to cross-examine and no substantive area of testimony they were unable to rebut because of the alleged lack of notice. Accordingly, the Government's remedies requests do not abrogate Defendants' procedural rights.

B. Specific Remedies

The Court will address each of the Government's proposed remedies *seriatim*.

1. Prohibition of Brand Descriptors

As described in detail in the Findings of Fact, *supra*, cigarettes marketed with descriptors such as "low tar," "light," "mild," and similar terms are no less likely to be harmful than other cigarettes. The terms themselves have no standardized meaning aside from a non-enforceable industry practice to apply the "light" descriptor to cigarettes with 7 to 14 milligrams of tar as measured by the FTC method, and "ultra light" to cigarettes with fewer than 7 milligrams of tar. Keane WD, 56:14-23; Mulholland WD, 26:4-27:9; *accord* Henningfield WD, 56:8-11. Of even greater concern is the fact that Defendants design "light" cigarettes to allow smokers to obtain much higher levels of nicotine than are measured by the FTC

method, and in fact manipulate cigarettes to provide sufficient nicotine delivery to create and sustain addiction. Burns WD, 29:6-13; Monograph 13, DXA0310399-0650 (US 58700).

The trial record overwhelmingly demonstrates that Defendants developed and marketed low tar and nicotine brands in order to dissuade smokers from quitting smoking. *See* Findings of Fact Section V(E). Defendants know that health concerns are the primary motivation for smokers' attempts to quit. They have conducted extensive research on quitting to help them identify, understand, and deter potential quitters. Defendants' internal documents show that they were confident that if they could convince potential quitters that low tar cigarettes were a healthier choice and an acceptable alternative to quitting, they could keep their sales from declining. *See also* Burns WD, 41:12-18, 46:21-47:9, 49:11-20.

Based on that knowledge, Defendants introduced a number of brands and brand extensions lower in tar and nicotine and positioned them as 'health reassurance' brands to meet the health concerns of smokers. Defendants' own internal research showed that "smoking low tar and nicotine helped a smoker to reduce guilt about smoking and thus made a smoker less likely to quit. Smoking a 'health reassurance' product with its low tar FTC rating was a 'compromise' to justify not quitting." Dolan WD, 106:14-107:2; 118:4-8; 118:23-119:21; 126:8-16; *accord* Burns WD, 69:3-14 (beginning in the 1950s, Defendants "introduced and marketed filtered cigarettes

and 'low tar and nicotine' cigarettes as an effort to prevent smokers from quitting based on growing health concerns among smokers"). As a result, consumers labor under a longstanding and pervasive misconception that "low tar/low nicotine" cigarettes are safer than their full flavor counterparts. *See* Findings of Fact Section V(E)(3).

As Dr. Farone testified, the terms "light" and "low tar," as used by Defendants, are "meaningless" and "arbitrary," because "light" and regular cigarettes of the same brand can have the same FTC yields:

> [T]here are lights of certain brands with higher tar levels than regulars of other brands from the same company, and there are also lights and regulars of the same brand that have the same FTC tar rating. So therefore the term 'light' is not related to tar or taste. For example, according to the most recent FTC report of tar and nicotine yields, Philip Morris sells versions of Virginia Slims and Virginia Slims Lights that both deliver 15 mg of tar by the FTC method.

Farone WD, 116:3-14; 525311179-1223 at 1185, 1207-1208, 1222 (US 52977).

Gary Burger, Senior President of Research & Development for RJR, admitted in a 1997 deposition, that RJR was aware that consumers smoke low tar cigarettes for the perceived health benefit. Burger said that "[c]ertainly, smokers perceive lower tar cigarettes in some ways to be better for them and therefore they want them." He further acknowledged

that consumers "have that impression that there are higher levels of bad stuff in high tar cigarettes and lower levels of bad stuff in low tar cigarettes." Burger PD, *Arch v. American Tobacco Co.*, 8/21/97, 226:9-243:18. In addition, research conducted for B&W as recently as 2000 confirmed that consumers still misperceive "lights" as less harmful. 250255060-5075 at 5064, 5066-5068, 5071-5075 (US 22170); Ivey WD, 59:20-60:12.

As data have emerged establishing that "light" and "mild" cigarettes are at least as harmful as "full-flavor" brands, Defendants have developed new descriptors to convey implied health reassurance messages. B&W developed and marketed the "Kool Natural Lights" brand extension in 1998. Despite having market research showing that consumers incorrectly interpret the word "natural" to mean that the cigarettes are safer than conventional cigarettes, B&W advertised Kool Natural Lights without informing consumers that "natural" cigarettes are no safer than any others. Smith TT, 1/6/05, 9178:18-9182:9; 210430297-0396 at 0322 (US 67711); ADV0100742-0744 (US 2701) (advertisement in 2001 issue of Rolling Stone); (US 12651) (advertisement in 2000 issue of Maxim).

Significantly, although lower-yield cigarettes have dominated the U.S. market for many years, there has been no corresponding reduction in smoking-related disease among U.S. smokers; in fact, the disease risk has increased. Burns WD, 33:18-35:9; Monograph 13, DXA0310399-0650 (US 58700).

Accordingly, the only way to restrain Defendants from their longstanding and continuing fraudulent efforts to deceive smokers, potential smokers, and the American public about "light" and "low tar" cigarettes is to prohibit them from using any descriptor which conveys a health message. It is not sufficient to forbid Defendants from misrepresenting the health effects of "light" and "low tar" cigarettes. By using descriptors such as "lights" and "low tar," Defendants knowingly convey the false impression that cigarettes with those labels are less harmful than other cigarettes. Consumers' false belief is so pervasive and longstanding, and has been exploited and promoted by Defendants for so long, that preventing and restraining Defendants' future fraud requires a ban on any future use of descriptors which convey a health message.

As the National Cancer Institute concluded in Monograph 13, descriptors are inherently deceptive. US 58700 at 0611, 0646. Similarly, the WHO Scientific Advisory Committee on Tobacco concluded that descriptors are inherently misleading, and recommended that "misleading health and exposure claims should be banned. . . . Banned terms should include light, ultra-light, mild and low tar, and may be extended to other misleading terms." US 86658 at 0695. As set out above, Defendants' own documents, including consumer research, and testimony demonstrate that Defendants both knew and intended to use brand descriptors to convey a false perception of reduced harm. *See* Findings of Fact Sections V(E)(3, 5).

The Court will therefore order a ban on any cigarette descriptors that convey implicit health claims. Prohibition of Defendants' future use of deceptive descriptors is forward looking and narrowly tailored to prevent and restrain their future fraudulent conduct relating to the marketing of low tar cigarettes. Indeed, this remedy directly addresses the ongoing fraud Defendants commit every day with their marketing of "light" cigarettes and the virtually certain continuation of such fraud in the future in the absence of such a ban. Accordingly, beginning January 1, 2007, Defendants are prohibited from using any descriptors indicating lower tar delivery – including, but not limited to, "low tar," "light," "mild," "medium" and "ultra light" – which create the false impression that such cigarettes are less harmful to smokers.[52]

2. Corrective Communications

The trial record amply demonstrates that Defendants have made false, deceptive, and misleading

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[52] Defendants claim that prohibition of their deceptive use of descriptors "would improperly invade the primary jurisdiction of the FTC," JD PFOF, ch. 13 ¶ 599, but "[t]he FTC does not impose, regulate, or require [descriptors]. How those terms are applied, and on which brands, is entirely up to the tobacco companies." Henningfield WD, 56:8-11. Further, Defendants' claim reiterates their previous argument that such relief is preempted by the FTC Act, an argument which the Court has already rejected. *See United States v. Philip Morris, Inc.*, 263 F. Supp. 2d 72, 74 (D.D.C. 2003).

public statements about cigarettes and smoking from at least January 1954, when the Frank Statement was published up until the present. *See* Findings of Fact Sections V(A)(5)(c) and V(G)(7, 8), *supra* (public statements on adverse health effects, including exposure to secondhand smoke); Section V(B)(4), *supra* (public statements on addictiveness of smoking and nicotine); Section V(C)(3), *supra* (public statements on nicotine manipulation); Section V(F)(7), *supra* (public statements on youth marketing); Section V(E)(4), *supra* (statements on "light" and "low tar" cigarettes).

Evidence in the record also amply demonstrates that certain of Defendants' public statements communicating their positions on smoking and health issues continue to omit material information or present information in a misleading and incomplete fashion. For example, Reynolds's current website statement on the health effects of smoking continues to insist that smoking "causes disease in some individuals" only "in combination with other factors." (JD 068012); *see also* Schindler TT, 1/24/05, 10810:9-10813:5 (Reynolds' recent Chairman and CEO refusing to admit that cigarette smoking causes disease).

In addition, Philip Morris's current website claims that the company's position on addiction is the same as the public health community's, but Philip Morris's statement on addiction omits the material information that nicotine delivered by cigarettes is a

drug and that it is addictive. 3000172188-2188 (JD 053199).

As the Court has noted, certain language in some of Defendants' more recent positions on smoking and health issues, following their decades of denials and distortion, do represent a step forward. *See, e.g.*, Henningfield TT, 11/29/04, 7185:2-8. However, evidence in the record supports a finding that notwithstanding Defendants' self-serving claims that they have been more forthcoming on smoking and health issues, and notwithstanding a general prohibition in the MSA precluding those Defendants who are a party to it from making any "material misrepresentation of fact regarding the health consequences of using any Tobacco Product," Defendants continue to make affirmative statements on smoking and health issues that are fraudulent. MSA § III(r) at 36 (JD-045158). Accordingly, an injunction ordering Defendants to issue corrective statements is appropriate and necessary to prevent and restrain them from making fraudulent public statements on smoking and health matters in the future.

Contrary to Defendants' arguments, the First Amendment does not preclude corrective statements where necessary to prevent consumers from being confused or misled. Any interest Defendants have in avoiding compelled speech are easily outweighed by the government's interest in preventing future consumer deception or confusion. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (upholding disclosure

requirement in attorney advertising regarding terms of contingency agreement). In accordance with this principle, our Court of Appeals has expressly held that mandatory disclosures regarding commercial products are consistent with the First Amendment when required to correct a manufacturer's campaign of deceptive or misleading marketing or to prevent consumer confusion. *See Novartis Corp. v. FTC,* 223 F.3d 783, 788-89 (D.C. Cir. 2000) (holding that the trial court was permitted to enter a corrective statement remedy because it "advances precisely the 'interest involved,' namely the avoidance of misleading and deceptive advertising"); *Warner-Lambert Co. v. FTC,* 562 F.2d 749, 769-70 (D.C. Cir. 1977).

In *Warner Lambert,* the D.C. Circuit upheld the FTC's order which required Warner-Lambert to cease and desist from representing that Listerine mouthwash prevents or alleviatcs the common cold, and required the company to include in future advertising the phrase "Listerine will not help prevent colds or sore throats or lessen their severity." 562 F.2d at 756. The Court rejected a First Amendment challenge to the order, finding that the protection extended to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), which expressly permitted government regulation of false or misleading advertising, authorized an order requiring the company to make corrective statements in order to counteract its earlier, fraudulent statements. The court also upheld the FTC's position that the corrective statements

were necessary because "a hundred years of false cold claims have built up a large reservoir of erroneous consumer belief which would persist, unless corrected, long after petitioner ceased making the claims." *Id.*

The Court explained, in language that is particularly applicable to this case, that:

> To be sure, current and future advertising of Listerine, when viewed in isolation, may not contain any statements which are themselves false or deceptive. But reality counsels that such advertisements cannot be viewed in isolation; they must be seen against the background of over 50 years in which Listerine has been proclaimed and purchased as a remedy for colds. When viewed from this perspective, advertising which fails to rebut the prior claims as to Listerine's efficacy inevitably builds upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly. . . . Under this reasoning the First Amendment presents no direct obstacle. The Commission is not regulating truthful speech protected by the First Amendment, but is merely requiring certain statements which, if not present in current and future advertisements, would render those advertisements themselves part of the continuing deception of the public.

Id. at 769.

Here, too, certain Defendants have recently modified their public statements regarding the adverse health effects of smoking cigarettes and their addictiveness. Nevertheless, as in *Warner Lambert,* additional corrective statements to consumers and the public are necessary to prevent current and future advertisements from becoming "themselves part of the continuing deception of the public." 562 F.2d at 769. The injunctive relief sought here is narrowly tailored to prevent Defendants from continuing to disseminate fraudulent public statements and marketing messages by requiring them to issue truthful corrective communications. *See Zauderer,* 471 U.S. at 651.

The evidence identifies the various venues in which Defendants have made their fraudulent public statements about cigarettes, including, but not limited to, newspapers, television, magazines, onsets, and Internet websites. *See generally,* Findings of Fact. For example, from the inception of the Enterprise's fraudulent scheme, newspapers and magazines have been primary vehicles for disseminating Defendants' public statements on smoking and health issues. *See, e.g.,* 860174547454 (US 21418) (1954 Frank Statement printed in 448 newspapers nationwide); 2023011263-1263 (US 20371) (1994 Philip Morris "Facts You Should Know" advertisement in the New York Times); 500810940-0941 (US 23036) (BATCo's Blackie Letter to Editor in 1994); TI00581619-1629 (US 62969); Dawson WD, 114:18-115:21; Dawson TT, 1/12/05, 9907:21-9918:8 (ghostwritten letter to the

editor challenging evidence of health effects of secondhand smoke, prepared for outside scientist to send to editors at AP, UPI, and 22 newspapers across the country, without disclosing TI's role or that scientist was a paid Tobacco Institute consultant); 513943434-3434 (US 50268) (1984 RJR newspaper statement that whether smoking causes disease is an "open controversy").

More recently, Defendants – particularly Altria and Philip Morris – have used many of these same vehicles very effectively to disseminate their recently adopted Corporate Principles, including statements on smoking and health positions and alleged youth smoking prevention efforts. Szymanczyk WD, 86:22-93:3, 150:12-22. *See generally* Keane TT, 1/19/05, 10566:4-10578:17. For example, Philip Morris and Altria have run a range of television (and radio) advertisements to improve their public image, to promote Philip Morris's website, and to warn the public that there is no such thing as a safe cigarette. *See, e.g.,* Keane TT, 10/19/05, 10577:1-25, 10620:9-18 (testimony about Philip Morris's national television and radio advertising campaign).

Accordingly, the Court will structure a remedy which uses the same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages. Specifically, the Court will order Defendants to make corrective statements about addiction (that both nicotine and cigarette smoking are addictive); the adverse health effects of smoking (all the diseases which smoking has been

proven to cause); the adverse health effects of exposure to ETS (all the diseases which exposure to ETS has been proven to cause); their manipulation of physical and chemical design of cigarettes (that Defendants do manipulate design of cigarettes in order to enhance the delivery of nicotine); and light and low tar cigarettes (that they are no less hazardous than full-flavor cigarettes). Within sixty days of the issuance of this opinion and order, both parties will submit a proposal for the exact wording of these statements. After the Court approves particular statements, Defendants must publish such corrective statements in newspapers and disseminate them through television, advertisements, onsets, in retail displays, and on their corporate websites, as detailed in the accompanying Order.[53]

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[53] Defendants' argument that requiring corrective statements on package onserts would conflict with the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.* ("FCLAA") is unconvincing. This remedy falls within the narrow scope of equitable powers granted to the Court under Section 1964(a) because it specifically prevents and restrains Defendants from continuing to make statements about smoking and health that are fraudulent and misleading in vehicles which are likely to reach consumers. It does not implicate Section 5(a) of the FCLAA, because Section 5(a) only prohibits "state and federal rulemaking bodies from mandating particular cautionary statements" on cigarette packages. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). Under the FCLAA, a "package" is defined as "a pack, box, carton, or container of any kind in which cigarettes are offered for sale, sold, or otherwise distributed to consumers." 15 U.S.C. § 1332(4). An onsert, which is only a small informational brochure attached to the outside of the

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3. Disclosure of Documents and Disaggregated Marketing Data

As discussed in great detail in the Findings of Fact, Defendants' suppression and concealment of information has been integral to the Enterprise's overarching scheme to defraud. Not only have Defendants failed to publicly disclose all the information they internally held about their cigarettes, but they have also created false controversies about the existence of such information.

The Court finds that in order to prevent and restrain such RICO violations in the future, Defendants must create and maintain document depositories and websites which provide the Government and the public with access to all industry documents disclosed in litigation from this date forward. Disclosing such information will allow the public to monitor what Defendants are doing internally and to assess the accuracy of future information they may make available about their activities and their products. Imposing such disclosure requirements will act as a powerful restraint on Defendants' future fraudulent conduct. Indeed, this remedy is exactly what Judge Williams, in his concurrence in the disgorgement opinion, recommends that the District Court do under § 1964(a): "impose transparency

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"pack box, carton, or container . . . in which cigarettes are offered for sale, sold, or otherwise distributed to consumers," is not a package. Therefore, the remedy at issue does not implicate the FCLAA's preemption provision.

requirements so that future violations will be quickly and easily identified." 396 F.3d at 1203 (Williams, J., concurring).

The Supreme Court has recognized, in numerous other contexts over the past century, that compelled disclosures of information can prevent and restrain future frauds. In the election context, it explained that "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley v. Valeo,* 424 U.S. 1, 67 (1976) (per curiam) (discussing campaign contribution disclosure requirements); *see also Buckley v. Am. Constitutional Law Found., Inc.,* 525 U.S. 182, 222 (1999) (O'Connor, J., concurring in part and dissenting in part). In a different context, in *Village of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 637-38 (1980), the Supreme Court struck down under the First Amendment an ordinance that sought to reduce fraud by charitable organizations by dictating what percentage of their income they could spend on particular activities, but observed that "[e]fforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed." 444 U.S. at 637-38 (footnote omitted).

The Supreme Court has authorized injunctive relief requiring defendants who have been found to have engaged in past fraud to make ongoing public disclosures to prevent similar fraudulent conduct in the future. In *SEC v. Capital Gains Research Bureau,*

Inc., 375 U.S. 180 (1963), the Supreme Court held that because the Investment Advisers Act of 1940 authorized courts "to enjoin any practice which operates 'as a fraud or deceit upon any client or prospective client,'" the trial court was authorized to issue an injunction requiring the defendant to make ongoing public disclosures as a "mild prophylactic" to prevent it from repeating its past fraudulent and deceitful practices. 375 U.S. at 185, 193, 198-99.

As discussed below, most Defendants are currently subject to some public disclosure requirements for documents under the MSA. Most of those requirements will end between 2008 and 2010. Extending those obligations, and subjecting all Defendants to similar, ongoing disclosure obligations, will work to prevent and restrain them from engaging in future frauds.

The Government has also requested that Defendants be ordered to produce and make public all "health and safety risk information" in their own files relating to their products. The Government argues that disclosure of such information will prevent and restrain Defendants from making fraudulent denials about the hazardousness of their cigarettes. Although disclosure of health and safety risk information would obviously serve the public interest, the Government's request is far too broad and not narrowly tailored enough to include as a remedy.

a. Depositories

Requiring Defendants to make public the documents that they produce or use in future litigation or administrative actions, with certain safeguards to protect privileged and confidential trade secret information, is a first step towards preventing and restraining Defendants from engaging in future fraudulent activities. Document depositories will provide hard copies of documents to the public and thus will reduce Defendants' ability to suppress, conceal, or remove those documents from public access. While Defendants complain about the expense and burdensomeness of the Government's request, they are basically being required to merely extend into the future the operation of document storage facilities which have existed for almost ten years.

Currently, certain Defendants maintain the Guildford and Minnesota Depositories, which contain hard copies of documents produced in those respective sets of litigation. The May 1998 Minnesota settlement obliged the settling defendants in that case to pay for maintenance and operation of the Minnesota Depository for ten years. Those Defendants and BATCo were also required to send any additional documents produced in other smoking and health litigation to the Minnesota Depository during the same ten year period. Those obligations cease in May 2008. Neither Liggett nor Altria is subject to those obligations.

During the Minnesota litigation, BATCo created the Guildford Depository in Guildford, England, to provide the Minnesota litigants with access to documents created before the document production cutoff date in that litigation, August 18, 1994. *See* Order #38 (protocols for United States trip to Guildford Depository for access to pre-August 18, 1994 documents available to the public); Order #75 ¶ 2 at 2 (same, for access to non-public "files created between August 18, 1994 and December 31, 1999"). BATCo is obliged to maintain and operate the Guildford Depository collection of documents from 1994 and earlier. *See Minnesota* Consent Judgment § VII(D) (JD-093326). That obligation also ceases in May 2008.

The Court will order Defendants to continue maintaining their Minnesota and Guildford Depository obligations for an additional fifteen years. Furthermore, Defendants must provide meaningful tools to identify and analyze those documents. To that end, both document depositories must include databases which search individual documents (rather than files) by multiple bibliographic fields, such as Bates number, date, author, title, etc. Defendants are to employ the twenty-nine bibliographic fields specified in the MSA. Finally, Defendants must allow greater access to the Guildford Depository than that which is currently available. Presently, public access to the Guildford Depository is severely restricted, with only one organization and no more than six visitors allowed access per day; and copying requests often take weeks or months to fulfill. *See* Health

Committee, U.K. House of Commons, The Tobacco Industry and the Health Risks of Smoking, vol. 1 (2000), (¶¶234, 237); 322241213-1295 at 1282-1283 (US 93249); 770007956-8214 at 7994 (US 88132). Defendants will be required to provide access, at a minimum, to six organizations and a dozen visitors per day.

b. Websites

Section IV of the MSA obliges certain Defendants to create and maintain document websites for all documents produced during litigation, except those which are privileged or confidential. *See* MSA § IV(c) & (e) at 36, 39 (JD 045158). *See, e.g.*, Keane TT, 1/18/05, 10376:22-10377:7 (discussing Philip Morris's document website, www.pmdocs.com); McAllister WD, 8:25-9:4, 15:4-5 (discussing CTR document website, http://www.ctr-usa.org/ctr). The MSA's document website obligations expire on June 30, 2010. Neither Altria nor BATCo was a signatory to the MSA, and therefore neither is subject to these obligations.

Document websites have several significant desirable features that document depositories do not. Collections of tobacco documents placed on the web following the litigation of the 1990s, unlike the majority of non-digitized archival materials, are generally searchable through the web. In addition, relatively few members of the public are able to travel to Minnesota or England to access the Minnesota and Guildford Depositories, respectively, so a document

website "increases the availability of the documents to the general public." Brandt WD, 28:1-8; Szymanczyk WD, 202:4-6.

Accordingly, the Court will order Defendants to maintain websites for all documents which have been produced in litigation for a period of fifteen years. In addition, Defendants must provide bibliographic information for each document, if it is not apparent on the face of the document, and shall make such documents searchable by multiple bibliographic fields.

c. Privilege Claims

The tobacco industry has withheld enormous numbers of documents on grounds of privilege. The defendants in the Minnesota litigation, for instance, withheld some 230,000 documents (estimated to contain over 1,000,000 pages) on grounds of privilege or confidentiality because of proprietary interest. *See State of Minnesota v. Philip Morris,* 606 N.W.2d at 682. Given the magnitude of this litigation, the volume of documents over which Defendants asserted privilege is, if anything, substantially larger. For example, BATCo alone served privilege logs in this case with 91,723 entries for 72,593 different documents that it withheld from production on grounds of privilege or protection. *See* R & R #112 at 4 & n.3, adopted by Order #359. In addition, as detailed in Section V(H) of the Findings of Fact, Defendants have abused these protections, using privilege and

confidentiality designations to conceal potentially damaging information.

The purposes of document disclosure will be substantially frustrated unless the Court requires Defendants to provide complete and accurate information about any documents they withhold on grounds of privilege or other protection, including confidentiality. In order to provide the public with a reasonable method to determine which documents Defendants withhold on such grounds, the Court will order Defendants henceforth to provide full bibliographic information for all withheld documents, including titles (as well as a brief summary of the basis for the privilege or confidentiality assertion).

Compelling Defendants to provide accurate and updated indices of all documents they are withholding on grounds of privilege or confidentiality is the only way to guarantee transparency and ensure that Defendants do not engage in similar egregious conduct in the future. Without a Court-ordered mechanism to ensure that all appropriate documents are either disclosed, or are logged as being withheld, Defendants will continue to suppress documents from the public. Defendants must similarly be required to identify all document fields and give meaningful explanations for all documents that they withhold on grounds of confidentiality.

Defendants will also be required to provide regularly-updated information concerning all waivers and losses of privilege and confidentiality. Indeed, in

Order #51, § III.G.9, this Court ordered Defendants to identify all documents being withheld on grounds of privilege over which a court had previously ruled that their privilege assertion had been waived or was invalid. Imposing such a requirement on an ongoing basis is necessary to ensure that accurate and current information is available concerning which withheld documents have been adjudicated nonprivileged or non-confidential. Such a requirement is also necessary to ensure that once a Defendant waives privilege over particular documents, the public is on notice if and when the Defendant refuses to make those documents public.

d. Disaggregated Marketing Data

The FTC requires Defendants to maintain disaggregated marketing data[54] and to submit it at regular intervals, under strict confidentiality, pursuant to that agency's schedule for disclosure. Such data reveals with specificity exactly what Defendants' marketing dollars are being spent on. Such information has never been available to the public because the FTC only publishes the data in aggregated form.

In order to ensure transparency of Defendants' marketing efforts, particularly those directed towards

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[54] Disaggregated data is data broken down by type of marketing, brand, geographical region, number of cigarettes sold, advertising in stores, and any other category of data collected and/or maintained by or on behalf of each Defendant regarding their cigarette marketing efforts.

youth, and what effect such efforts are having, the Court will order Defendants to provide their disaggregated marketing data to the Government according to the same schedule on which they provide it to the FTC. Disclosure of this data will prevent and restrain Defendants from continuing to make false denials about their youth marketing efforts and will enable the Government to monitor such activities. The data which Defendants provide to the Government will be disaggregated by type of marketing, brand, geographical region, type of promotion or marketing used, number of cigarettes sold, and location of marketing (e.g. in store, in magazine, etc.). Because such information is clearly proprietary, however, it will not be made public, as the Government requests. Instead, it will be disclosed only to the Department of Justice, the enforcing agent for this decree, and be subjected to appropriate protective orders, such as have already been used in this litigation with no difficulties.

4. General Injunctive Provisions[55]

Even under the narrow interpretation of 18 USC 1964(a) by which this Court is bound, the Court may

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[55] The Government has also requested a specific injunction against Defendants' ongoing and future youth marketing. Although such a remedy would certainly serve the public interest, it does not prevent and restrain future RICO violations, which, in this case, are not Defendants' continuing efforts to market to youth but rather their false denials of those efforts. Accordingly, because this injunction does not meet the standard set forth in Judge Sentelle's Opinion, the Court cannot enter such a remedy.

enjoin specific future RICO violations upon its finding of liability under 1962(c) and (d). Accordingly, Defendants will be ordered to refrain from engaging in any act of racketeering, as defined in 18 USC § 1961(1) relating in any way to manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States.

Defendants will also be ordered not to participate in the management and/or control of any of the affairs of CTR, TI, CIAR, or any successor entities.

Defendants will also be ordered not to reconstitute the form or function of CTR, TI, or CIAR.

Finally, because this is a case involving fraudulent statements about the devastating consequences of smoking, Defendants will be prohibited from making, or causing to be made in any way, any material, false, misleading or deceptive statement or representation concerning cigarettes that is disseminated in the United States.

5. National Smoker Cessation Program

As laid out in detail in the Findings of Fact, Defendants employed highly sophisticated and expensive promotional campaigns to portray light and low tar cigarettes as less harmful than full flavor cigarettes in order to keep smokers from quitting. Defendants' concerted and ongoing effort to defraud consumers regarding light and low tar cigarettes has been a calculated and extremely successful scheme to

increase their revenues at the expense of smokers, potential smokers, and the American public. Over 50% of those who smoke light and ultra light cigarettes mistakenly believe that lights offer a less hazardous option to full flavor cigarettes. Weinstein WD 53:3-18. Of the almost 47 million Americans who smoke cigarettes today, more than 81% smoke "light" or "ultralight" cigarettes. Moreover, 70% of these smokers want to quit, but in any given year only 40% will attempt to quit and, tragically, only 2.5% will succeed. Fiore WD, 69:5-8.

To prevent future related RICO violations, the Government asks the Court to enter a remedy requiring Defendants to fund a national smoking cessation program including: (1) a national tobacco quitline network that will provide access to evidence-based counseling and medications for tobacco cessation; (2) an extensive paid media campaign to encourage smokers to seek assistance to quit smoking; and (3) a research agenda to achieve future improvements in the reach, effectiveness and adoption of tobacco dependence interventions and physician and clinician training and education. *See e.g.*, Fiore WD, 17:22-18:20.

Adoption of such a national smoking cessation program would unquestionably serve the public interest. However, under the narrow standard for § 1964(a) remedies articulated in Judge Sentelle's Opinion, the Court cannot enter such a remedy because it is not specifically aimed at preventing and restraining future RICO violations.

6. Youth Smoking Reduction Targets

There is overwhelming evidence in this case that Defendants encourage youth to smoke, track youth behaviors and preferences, market to youth based on that tracking, and accordingly, substantially contribute to youth smoking initiation and continuation. Because over 80% of adult smokers start before the age of 18, Defendants continue to pursue and profit from the youth market. Indeed, Defendants internally acknowledge that they cannot sustain the cigarette industry without securing new youth smokers. To give just one example, a 1984 R.J. Reynolds document candidly states, "Younger adult smokers are the only sources of replacement smokers. . . . If younger adults turn away from smoking, the industry must decline, just as a population which does not give birth will eventually dwindle." 501431517-1610 at 1526 (US 20680).

To prevent related RICO violations, the Government asks the Court to require Defendants to reduce youth smoking by 6% per year between 2007 and 2013. This remedy would provide a total reduction in smoking of 42% by 2013 among individuals between twelve and twenty years old, measured against a 2003 baseline year. Under the Government's plan, if Defendants should fail to meet their annual targets, they would be assessed $3,000 for each youth above the target who continues to smoke. The Government bases its figure on the fact that $3,000 is the upper limit on the lifetime proceeds a Defendant could expect to earn from making its brands appealing to

an individual within the demographic target. Such reductions could be made in whatever fashion Defendants, who are most knowledgeable about marketing to youth, see fit, including price increases for their cigarettes, which have already been demonstrated to reduce youth smoking initiation. The government reasons that such a remedy would reduce the incentive for Defendants to make their products appealing to youth by removing their ability to profit from youth marketing and from youth smoking initiation.

Although such a remedy is forward-looking, could prevent future RICO violations, and would unquestionably serve the public interest, it is not sufficiently narrowly tailored to meet the standard articulated by our Court of Appeals. *United States v. Philip Morris USA, Inc., et al.*, 396 F.3d at 1198-99. As Dr. Jonathan Gruber, an economist at the Massachusetts Institute of Technology, testified, the Youth Smoking Reduction Targets are an "outcome-based" remedy because they tie financial assessments to the outcome of youth smoking.[56] Youth smoking rates may increase or

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[56] Dr. Gruber based his youth smoking reduction targets on the 1997 Proposed Resolution, a draft settlement proposed by certain Defendants to Congress when it was considering federal regulation of the tobacco industry and resolution of all pending tobacco lawsuits. As Defendants vigorously argue, because the 1997 Resolution was never adopted and was merely part of a comprehensive settlement package, it would not be an appropriate basis for setting targets for reductions in youth smoking.

In addition, Dr. Gruber proposed, as one possible means for decreasing youth smoking rates, that Defendants use price increases alone to effectuate the necessary reductions. Dr.

(Continued on following page)

decrease due to input factors beyond Defendants' control. Accordingly, because the targets are aimed at reducing the public health consequences of marketing to youth and are not narrowly tailored to prevent and restrain Defendants' future RICO violations, the Government's proposed remedy cannot be entered by this Court.

7. Corporate Structural Changes

Defendants have engaged in an overarching scheme to defraud smokers and potential smokers for more than 50 years, employing the research and development, advertising, marketing, and public relations capabilities of each individual company and of the Enterprise as a whole. As the evidence overwhelmingly demonstrates, Defendants' fraudulent conduct has permeated all aspects of their operations – from how they design, manufacture, and market their products to how they communicate with the public about them – and continues to this day. Such fraudulent behavior has been driven by a desire to

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Gruber did note that Defendants have at their disposal many other tools by which they could choose to achieve the targets, but that price increases alone could yield the same result, if Defendants chose to take that course. In response, Defendants raised the concern that, with price increases, they would lose some market share (however minimal) to tobacco manufacturers who are party to neither this Order nor the MSA. As a result, those manufacturers could market to youth without any restrictions and thus undermine the very purpose of Dr. Gruber's proposal. This effect, if it occurred, would be of concern.

increase company profits and avoid huge liability judgments in litigation.

The Government asserts that unless Defendants make fundamental changes in their business practices and policies, they will continue to engage in RICO violations as long as such behavior is profitable. The Government contends that a "culture of fraud" permeates Defendants' business practices and, as a result, Defendants cannot be trusted with the responsibility of identifying and implementing the necessary changes in their own companies. Accordingly, the Government requests that the Court appoint an Independent Investigative Officer ("IO") – basically a tobacco czar – to review Defendants' business policies, practices, and operations and identify and implement appropriate procedures and measures which will remove the incentives, practices, and policies that have led Defendants to commit the RICO violations for which they have been found liable in this litigation.

Specifically, the Government asks the Court to appoint an IO to review Defendants' premises, papers, and personnel. That IO would have full access to Defendants' facilities, operations, employees, meetings, and records and would investigate the ways "in which the people, tasks, competencies, structures, incentives, and culture of a firm interrelate." Bazerman WD, 45:12 23. Next, the IO would identify and implement procedures and measures that will prevent and restrain Defendants from engaging in future RICO violations, including but not limited to:

(a) eliminating economic incentives for Defendants to market and sell cigarettes to youth; (b) changing compensation and promotion policies for managers and executives to reduce the likelihood of misconduct; (c) requiring subcontracting of certain research to independent third parties monitored by the Court; (d) requiring the institution of programs to educate managers in order to address bias in decision making; (e) creating internal mechanisms for employees, agents and contractors to report misconduct without fear of retribution; and (f) changing oversight and reporting arrangements to produce outcomes inconsistent with misconduct. Bazerman WD, 2:11-19, 3:4-15.

The Government also proposes appointment of an Independent Hearing Officer ("IHO") who would review Defendants' compliance with this Order, determine if there are violations, and enforce measures to remedy those violations. Therefore, while the IO would investigate Defendants' business practices and compliance with this Court's Order, the IHO would serve as a quasi-judicial officer when violations are alleged by the IO.

Even though this proposed remedy might conceivably prevent and restrain Defendants' future RICO violations, it would require delegation of substantial judicial powers to non-judicial personnel in violation of Article III of the Constitution. The Court has no authority to order such a far-reaching remedy. *See Cobell v. Norton,* 392 F.3d 461 (D.C. Cir. 2004) ("*Cobell II*"); *Cobell v. Norton,* 334 F.3d 1128 (D.C. Cir.

2003) ("*Cobell I*"). In *Cobell I*, the court appointed a Court Monitor, with the parties' consent, to "monitor and review all of the Interior Defendants' trust reform activities on behalf of certain Native American tribes and file written reports of his findings with the Court" for a period of one year. *Cobell I,* 334 F.3d at 1133-35. At the end of that year, over defendant's objection, the District Court extended the Monitorship for at least an additional year. The D.C. Circuit reversed, holding that "the district court does not have inherent power to appoint a monitor – at least not a monitor with the extensive duties the court assigned to [the Monitor in this case] – over a party's objection." *Id.* at 1141. The court noted that "it was surely impermissible to invest the Court Monitor with wide-ranging extra-judicial duties" and that this particular "Monitor was charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." *Id.* at 1142.

In this case, the Government's proposed remedy unconstitutionally delegates judicial powers to the Independent Hearing Officer. While it is permissible for the Court to appoint an individual to oversee and monitor implementation of a decree, here, as in *Cobell I,* the Court is being asked to give the IHO the power to conduct hearings, determine violations, and to direct changes in Defendants' actions and policies to ensure compliance with the Court's Order. The proposed IHO would have the authority to require Defendants to adopt "procedures and measures"

recommended by the IO. Additionally, the IHO would have the authority to order "removal of any officer, employee, or other member of senior management of any Defendant after determining that he or she acted in concert with one or more named Defendants in committing a civil RICO violation," which would obviously require the IHO to make determinations of liability. This suggested restructuring of Defendants' companies goes too far. The Court simply does not have the power to impose such a far-reaching and intrusive remedy. Accordingly, because the powers granted to the IHO constitute an impermissible delegation of Article III powers, the Court cannot enter the Government's proposed plan for oversight of the implementation of this decree by independent officers.

8. Public Education and Counter-marketing Campaign

As laid out in detail in the Findings of Fact, Defendants have preserved and enhanced the market for cigarettes in part by making statements about the health effects of smoking and secondhand smoke and by denying their marketing to youth. Defendants denied that smoking and secondhand smoke cause disease long after they internally recognized that such facts were true, and thereby provided smokers with sufficient reason to maintain their addiction. In addition, Defendants spent hundreds of millions of dollars advertising their cigarettes with youth

appealing imagery and campaigns which substantially contributed to youth smoking initiation and continuation. Defendants' denials of the hazards of smoking are exceptionally effective because the general public, and youth in particular, significantly underestimate all the risks of beginning and continuing to smoke.

To prevent future related RICO violations, the Government asks the Court to enter a remedy requiring Defendants to fund a long-term, extensive, culturally-competent public education and countermarketing campaign. The Government proposes a campaign with two primary purposes: (1) educating youth and adults about the hazards of smoking and exposure to secondhand smoke and (2) informing youth that Defendants are marketing to and attempting to manipulate them. This campaign would be aimed at diluting both the impact of Defendants' fraudulent statements and at undermining the efficacy of Defendants' marketing efforts towards youth. Countermarketing would very likely help to change the social environment which currently normalizes tobacco use among youth, making it less socially acceptable. Finally, providing youth with fully accurate information about smoking would serve to reduce the number of youth smokers, reduce the number of addicted adult smokers in the future, and thereby potentially reduce the economic incentives for Defendants to continue their fraud.

Adoption of such a public education and countermarketing campaign would unquestionably serve the

public interest. However, under the narrow standard for § 1964(a) remedies articulated in Judge Sentelle's Opinion, the Court cannot enter such a remedy because it is not specifically aimed at preventing and restraining future RICO violations.[57]

9. Costs

At the conclusion of the case, upon a finding of liability, it is appropriate to award costs. "Costs are accorded to prevailing litigants . . . under Rule 54(d) of the Federal Rules of Civil Procedure."[58] *Moore v. National Ass'n of Sec. Dealers, Inc.*, 762 F.2d 1093, 1107 (D.C. Cir. 1985); *Hoska v. United States Dept. of the Army*, 694 F.2d 270, 272 (D.C. Cir. 1982). Local Civil Rule 54.1 states that "[c]osts shall be taxed as provided in Rule 54(d), Federal Rules of Civil Procedure," and specifically enumerates those costs that can be awarded to the prevailing party. LCvR 54.1(a) and (d).

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[57] As is obvious, the Court is not entering as remedies either the proposed national smoker cessation program or the proposed public education and countermarketing campaign. Accordingly, Joint Defendants' Motion for Judgment on Partial Findings Pursuant to Fed. R. Civ. P. 52(c) with Respect to Certain Remedies Sought by the United States is denied as moot.

[58] Rule 54(d) of the FRCP states: "Except when express provisions therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs."

Accordingly, because the United States has proven its case by a preponderance of the evidence and because the Court has found the Defendants liable under 18 U.S.C. §§ 1962(c) and (d), costs will be awarded to the Government. The United States will be required to serve and file a bill of costs in accordance with LCvR 54 within 30 days from the date of this Opinion and its accompanying Order.

A Final Judgment and Remedial Order will accompany this Opinion.

August 17, 2006

/s/
Gladys Kessler
United States
District Court Judge

Copies served upon:
Counsel of record by ECF

449 F.Supp.2d 1

United States District Court,
District of Columbia.
UNITED STATES of America, Plaintiff,
Civil Action No. 99-2496(GK)
Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Non-smokers' Rights, and National African American Tobacco Prevention Network, Intervenors,
v.
PHILIP MORRIS USA, INC.,
(f/k/a Philip Morris, Inc.), et al. Defendants.

No. CIV.A. 99-2496(GK).

Aug. 17, 2006.

ORDER # 1015 Final Judgment and Remedial Order

KESSLER, District Judge.

Based upon the Findings of Fact and Conclusions of Law, the Court hereby enters this Final Judgment and Remedial Order.

I. Judgment

It is hereby Ordered that Final Judgment is entered for the Plaintiff, the United States of America, on Counts 3 and 4 of the Complaint, imposing liability under Sections 1962(c) and (d) of the Racketeer Influenced and Corrupt Organizations Chapter of Title 18 of the United States Criminal Code.

II. Applicability

This Final Judgment and Remedial Order applies to each of the Defendants, except Liggett, The Council for Tobacco Research, Inc. and The Tobacco Institute to whom it shall not apply, (hereinafter "Defendants") and to each of their current and future directors, officers, agents, servants, employees, subsidiaries, attorneys, assigns and successors. This Final Judgment and Remedial Order shall also apply to those persons in active concert or participation with Defendants and their current and future directors, officers, agents, servants, employees, subsidiaries, attorneys, assigns and successors who have received actual notice of this Final Judgment and Remedial Order by personal service or otherwise (hereinafter "Covered Persons and Entities").

II. Specific Remedial Orders

A. General Injunctive Relief

1. All Defendants, Covered Persons and Entities are permanently enjoined from committing any act of racketeering, as defined in 18 U.S.C. § 1961(1), relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States.

2. All Defendants, Covered Persons and Entities are permanently enjoined from participating in any way, directly or indirectly, in the management and/or control of any of the affairs of CTR, TI, or The Center for Indoor Air Research ("CIAR"), or any

successor entities of CTR, TI, or CIAR, or other entity affiliated with CTR, TI, or CIAR, known to the Defendant, Covered Person or Entity to be engaged in any act of racketeering; from having any dealings about any matter that relates directly or indirectly to the management and/or control of CTR, TI, or CIAR, or any successor or affiliated entities known to them to be engaged in any act of racketeering; and from reconstituting the form or function of CTR, TI, or CIAR, except that the prohibition against reconstituting the form or function of TI shall not prohibit the Defendants from engaging in lobbying activity that is otherwise permissible.

3. All Defendants, Covered Persons and Entities are permanently enjoined from making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation, or engaging in any public relations or marketing endeavor that is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes. Such material statements include, but are not limited to, any matter that: (a) involves health, safety, or other areas with which a reasonable consumer or potential consumer of cigarettes would be concerned; (b) a reasonable consumer or potential consumer would attach importance to in determining whether to purchase or smoke cigarettes; or (c) the Defendant, Covered Person or Entity making the representation knows or has reason to know that its recipient regards or is likely to regard as important in determining whether to purchase

cigarettes or to smoke cigarettes, even if a reasonable person would not so regard it.

4. All Defendants, Covered Persons and Entities are permanently enjoined from conveying any express or implied health message or health descriptor for any cigarette brand either in the brand name or on any packaging, advertising or other promotional, informational or other material. Forbidden health descriptors include the words "low tar," "light," "ultra light," "mild," "natural," and any other words which reasonably could be expected to result in a consumer believing that smoking the cigarette brand using that descriptor may result in a lower risk of disease or be less hazardous to health than smoking other brands of cigarettes. Defendants are also prohibited from representing directly, indirectly, or by implication, in advertising, promotional, informational or other material, public statements or by any other means, that low-tar, light, ultra light, mild, natural, or low-nicotine cigarettes may result in a lower risk of disease or are less hazardous to health than other brands of cigarettes.

B. Corrective Statements

5. Each Defendant shall be required to make separate corrective statements concerning each of the following: (a) the adverse health effects of smoking; (b) the addictiveness of smoking and nicotine; (c) the lack of any significant health benefit from smoking "low tar," "light," "ul a light," "mild," and "natural,"

cigarettes; (d) Defendants' manipulation of cigarette design and composition to ensure optimum nicotine delivery; and (e) the adverse health effects of exposure to secondhand smoke (also known as environmental tobacco smoke, or ETS). Within sixty days of the date of this Final Judgment and Remedial Order, the parties shall each submit a proposal for the exact wording of such corrective statements, with any supporting materials deemed necessary. After the Court enters an Order identifying which corrective statements for each topic listed above are appropriate, Defendants shall follow the schedule outlined below for dissemination and publication of those statements. Slight variations in the corrective communications may be necessary and appropriate to accommodate the media or format utilized but no such variations may be implemented without prior approval from the Court.

6. All corrective statements shall be placed in a prominent position on any publicly-accessible website of each Defendant for the duration of this Final Judgment and Remedial Order, including the following websites and/or any other web address that provides access to Defendants' corporate website or any successor website thereto, and the Internet Document Websites created or maintained pursuant to Section III(C)(¶ 8-9):

a. www.pmusa.com

b. www.altria.com

c. www.rjrt.com (including www.bw.com)

d. www.lorillard.com

e. www.bat.com

7. In order to ensure maximum exposure to consumers, potential consumers, and the general public, the corrective statements shall also be disseminated in the following ways:

a. Using their existing (or future acquired or improved) technology, each Defendant shall affix to cigarette packaging, either to the outside of or within the outer cellophane wrapping around the package, an "onsert" containing the corrective statements, in the same manner as certain Defendants, such as Philip Morris and Brown & Williamson, have utilized package onserts in the past. One corrective statement shall be placed on package onserts, to be included with each pack of Defendants' cigarettes shipped for retail distribution in the United States during the first two weeks of every February, June, and October ("installments"), beginning no later than February 2007 and continuing for two years thereafter. During the course of these two years, each Defendant must include each of the five corrective statements approved pursuant to Section III(B)(¶ 5) in at least one installment.

b. Each of the corrective statements approved pursuant to Section III(B)(¶ 5) of this Final Judgment and Remedial Order shall also be designed by Defendants for inclusion in a Countertop Display and Header Display at retail point-of-sale. Each Defendant that utilizes a Retail Merchandising Program shall require

retailers who participate in such program to display each Countertop Display in a position of prominent visibility for the entire four month period, until it is replaced by a subsequent Countertop Display during the two-year duration set forth in Section III(B)(¶ 7)(a) of this Order. Each Defendant that utilizes a Retail Merchandising Program shall require retailers who participate in such program to display each Header Display in an equivalent position with any other brand advertising header for the entire period on the same schedule, whether monthly or quarterly, that any other brand advertising header is utilized. The Header Display shall be of at least equivalent size as any other brand advertising header or headers provided by Defendants. During the two year period set forth in Section III(B)(¶ 7)(a) of this Order, each Defendant shall include each of the five Court approved corrective statements in a Countertop Display and Header Display at least once. Each Defendant shall suspend from its Retail Merchandising Program for a period of one year any retailer that fails to comply with this provision.

c. Each Defendant shall cause the text of all corrective statements approved pursuant to Section III(B)(¶ 5) of this Final Judgment and Remedial Order to be published as a full page advertisement in the first section of the Sunday edition of each of the following newspapers: Atlanta Journal-Constitution, Boston Globe, Boston Herald, Charlotte Observer, Chicago Sun Times, Chicago Tribune, Dallas Morning News, Florida Times Union, Fresno Bee, Ft. Worth Star-Telegram, Houston Chronicle, Los Angelos Times,

Miami Herald, New York Daily News, New York Post, New York Sun, New York Times, Orlando Sentinel, Palm Beach Post, Philadelphia Inquirer, Richmond Times-Dispatch, Sacramento Bee, San Diego Union-Tribune, San Francisco Chronicle, St. Petersburg Times, Tallahassee Democrat, USA Today, Wall Street Journal, Washington Post, LA Eastern Group Publications, San Francisco La Oferta Review/El Vistaz-Combo, NAHP, Chicago Lawndale Group News, NAHP, Houston – Que Onda! Corrective statements published in Spanish-language newspapers shall appear in Spanish. The statements shall identify the Defendant making the corrective statements. Full page advertisements shall be placed by each Defendant on the following schedule:

(1) Altria: the Sunday edition on the 16th Sunday following the date of this Final Judgment and Remedial Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 16th Friday following the date of this Final Judgment and Remedial Order.

(2) BATCo: the Sunday edition on the 20th Sunday following the date of this Final Judgment and Remedial Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the

20th Friday following the date of this Final Judgment and Remedial Order.

(3) B & W: the Sunday edition on the 24th Sunday following the date of this Final Judgment and Remedial Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 24th Friday following the date of this Final Judgment and Remedial Order.

(4) Lorillard: the Sunday edition on the 28th Sunday following the date of this Final Judgment and Remedial Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 28th Friday following the date of this Final Judgment and Remedial Order.

(5) Philip Morris: the Sunday edition on the 32nd Sunday following the date of this Final Judgment and Remedial Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 32nd Friday following the date of this Final Judgment and Remedial Order.

(6) R. J. Reynolds: the Sunday edition on the 36th Sunday following the date of this Final Judgment and Remedial Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 36th Friday following the date of this Final Judgment and Remedial Order.

d. Each Defendant shall cause at least one of the corrective statements approved pursuant to Section III(B)(¶ 5) of this Final Judgment and Remedial Order to appear as an advertisement on one or more of the three major television networks, i.e., CBS, ABC, or NBC. The ads shall last at least 15 seconds and shall run at least once per week between the hours of 7:00 p.m. and 10:00 p.m. between Monday and Thursday. Each Defendant shall run its advertisements on their chosen network(s) for one year. Each of the corrective statements approved pursuant to Section III(B)(¶ 5) of this Final Judgment and Remedial Order must be advertised by each Defendant at least ten times during the one year period. Defendants shall commence airing the first of their ads no later than February, 2007.

C. Document Disclosure in Depositories and on Websites

8. Defendants Philip Morris, R.J. Reynolds, Lorillard, and Brown & Williamson, shall maintain Internet Document Websites until September 1, 2016

at their expense. These Defendants shall maintain on their Internet Document Websites the documents and bibliographic information that currently appear on their respective Internet Document Websites as well as the additional documents and bibliographic information described below. These Defendants shall provide links to their Internet Document Websites from any and all publicly-accessible company websites and shall display such links prominently and in a manner easily accessible to visitors.

9. Defendant BATCo shall create and maintain by January 1, 2007 an Internet Document Website until September 1, 2016, at its expense. The BATCo Internet Document Website shall be created and publicly accessible no later than 120 days from the date of this Final Judgment and Remedial Order. BATCo shall provide links to its Internet Document Website from any and all publicly-accessible company websites and shall display such links prominently and in a manner easily accessible to visitors.

10. Each Defendant shall add documents and bibliographic data to its website(s) as follows:

a. Each Defendant shall add the following additional documents: (1) all documents produced to the Government in this case; (2) all documents produced on or after the date of this Final Judgment and Remedial Order in any court or administrative action in the United States concerning smoking and health, marketing, addiction, low-tar or low-nicotine cigarettes, or less hazardous cigarette research; and (3) all

transcripts of depositions and letters of request testimony (with corresponding exhibits if not already on the website) given by any of their current or former employees, officers, directors, corporate designees, attorneys or agents, in this action or in any court or administrative action in the United States concerning smoking and health, marketing, addiction, low-tar or low-nicotine cigarettes, or less hazardous cigarette research; such transcripts shall be in machine-readable text if received or available from a court reporter. Philip Morris shall provide on its web-site all such documents produced by, pertaining to, or concerning Altria.

b. Each Defendant shall add these additional documents referred to in the previous paragraph, as well as any other data newly required by this Final Judgment and Remedial Order, to its Internet Document Website(s) within 45 days of the date of production, in the case of documents; and within 45 days of receipt of the transcript, in the case of depositions and letters of request testimony. These requirements are subject to Section III(C)(¶ 14) concerning documents under court order or ruling.

c. Each Internet Document Website shall provide, and be searchable by, the following bibliographic fields for all documents (even those withheld on grounds of privilege or confidentiality):

(1) Document ID;

(2) Master ID;

(3) Other Number;

(4) Document Date;

(5) Primary Type;

(6) Person Attending;

(7) Person Noted;

(8) Person Author;

(9) Person Recipient;

(10) Person Copied;

(11) Person Mentioned;

(12) Organization Author;

(13) Organization Recipient;

(14) Organization Copied;

(15) Organization Mentioned;

(16) Organization Attending;

(17) Organization Noted;

(18) Physical Attachments;

(19) File Name;

(20) Old Brand;

(21) Primary Brand;

(22) Mentioned Brand;

(23) Page Count;

(24) Live hyperlink to document image (except where image is withheld);

(25) Court or administrative case in which document was produced or transcript taken, including case title(s), action number(s), court(s) or administrative body(ies);

(26) Date on which document was produced or transcript was received;

(27) Date hard copy was produced to Minnesota or Guildford Depository; and

(28) Box number in which hard copy was produced to Minnesota or Guildford Depository.

In addition, Defendant BATCo's bibliographic fields shall include the File Number, File Owner, and File User fields that it used in this lawsuit, and its website shall identify the Folder Number prefixes.

d. The Internet Document Websites shall also provide, and be searchable by, the above fields for documents withheld from the website on grounds of privilege ("the privilege log"), and for documents withheld from the website on grounds that they contain trade secret information ("the confidential document index"). Each Internet Document Website's privilege log shall also provide fields stating the basis for the privilege assertion with sufficient detail to allow an opposing party or court to assess the merits of the assertion; and, as in Order # 51, ¶ III. G. 9, a statement of whether the claimed privilege has ever been (i) expressly waived, or (ii) ruled waived, invalid, inapplicable or unenforceable for any reason by a court, with a specification of the

case title(s), action number(s), court(s), date(s) of waiver or decision, and Document ID(s) for such waivers, orders and decisions. Each Internet Document Website shall post a copy of all such waivers, orders and decisions (and underlying judicial materials such as magistrate judge reports and recommendations). Defendants may withhold the title of documents withheld on grounds of privilege if the document title, without reference to the document's contents, reveals privileged information, with the restriction that the title must be provided where a Defendant has previously waived privilege over the document title, e.g., pursuant to Order # 75, ¶ 8.

e. Each Internet Document Website shall provide its bibliographic data index, privilege log and confidential document index in a format suitable for downloading (e.g., comma separated value (CSV) file, compressed in a ZIP or similar format). In addition, monthly update files shall be provided in a format suitable for downloading, and shall be maintained on the website for 12 months.

11. Each Defendant shall, at its expense, produce documents to the Minnesota Depository created in *Minnesota v. Philip Morris Inc.*, No. C1-94-8565 (Minn.Dist.Ct.), or its successor, as follows:

a. Each Defendant shall produce to the Minnesota Depository hard copies of all documents described in Section III(C)(¶ 10)(a).

b. These documents shall be produced to the Minnesota Depository within 30 days of being

produced in the related judicial or administrative proceeding (or received from the court reporter). This requirement is subject to Section III(C)(¶ 14) below concerning documents under court order or ruling.

c. Each production of documents to the Minnesota Depository shall include an index of the documents produced in that production, with the fields specified in Section III(C)(¶ 10)(c), in both hard copy and electronic form.

d. Each Defendant shall continue to fund and produce documents to the Minnesota Depository until September 1, 2016.

12. BATCo shall continue to maintain its obligations as to documents available in the Guildford Depository until September 1, 2016. BATCo shall ensure access to the Guildford Depository for six organizations and 12 visitors per day.

13. A Defendant may redact from a document placed on its Internet Document Website or produced to the Minnesota Depository individual Social Security numbers, home addresses, and home telephone numbers. Such redactions shall indicate that confidential personal information has been redacted. Wherever less than the entirety of a document is subject to a claim of privilege or trade secret pursuant to Section III(C)(¶ 14), the Defendant shall produce the document in redacted form on its Internet Document Website and to the Minnesota Depository. Such redactions shall indicate that privileged or trade secret information, as appropriate, has been redacted.

14. This Final Judgment and Remedial Order does not require any Defendant to place on its Internet Document Website or in the Minnesota Depository documents that: (1) it continues to claim to be privileged or a trade secret in the document's entirety, or (2) continue to be subject in the document's entirety to any protective order, sealing order or other order or ruling that prevents or limits that Defendant from disclosing such documents. As defined in Order # 36, 2002 WL 1876452, a "trade secret" is information, including a formula, pattern, compilation, program, device, method, technique or process that (a) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure and use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. However, the foregoing exceptions shall not apply to documents which a Defendant continues to claim to be privileged but which this Court ordered produced in this lawsuit; and shall not apply to documents which a Defendant continues to claim to be a trade secret or contain confidential or proprietary business information, or which continue to be subject to any protective order, sealing order or other order or ruling that prevents or limits that Defendant from disclosing such documents, if this Court overruled such assertions and/or that Defendant did not make such assertions to prevent the documents from being used in open court during this lawsuit.

15. Because the economic value of many trade secrets substantially declines with the passage of time, each Defendant shall review all trade secret assertions every three years to determine whether they still satisfy the definition of "trade secret." The first review shall be completed within one year of this Final Judgment and Remedial Order. Each Defendant shall, every three years, file a report with the Court indicating any changes in the assertion of trade secret status.

D. Disclosure of Disaggregated Marketing Data

16. Each Defendant shall be required to disclose all disaggregated marketing data to the Government in the same form and on the same schedule which Defendants now follow in disclosing disaggregated marketing data to the Federal Trade Commission. Defendants must disclose such data to the Government for a period of ten years from the date of this Final Judgment and Remedial Order.

17. Disaggregated Marketing Data shall be maintained in the databases and formats maintained by Defendants, and all reports generated from such Disaggregated Marketing Data shall be made available to the Government.

18. In addition, each year's Disaggregated Marketing Data shall be separately maintained in a format suitable for downloading (e.g., comma separated

value (CSV) file, compressed in a ZIP or similar format). All data fields shall be specified.

19. All Disaggregated Marketing Data shall be deemed "confidential" and "highly sensitive trade secret information," as defined in Orders # 7 and # 36, 2002 WL 1876452, and shall be subject to the provisions of those Orders.

IV. Miscellaneous Provisions

20. **Transfer of Tobacco Brands or Businesses.** No Defendant shall sell or otherwise transfer or permit the sale or transfer of any of its cigarette brands, brand names, cigarette product formulas or cigarette businesses (other than a sale or transfer of cigarette brands or brand names to be sold, product formulas to be used, or cigarette businesses to be conducted, by the acquiror or transferee exclusively outside of the United States) to any person or entity unless (1) such person or entity is already a Defendant subject to this Final Judgment and Remedial Order, or (2) prior to the sale or acquisition, such person or entity (a) submits to the jurisdiction of this Court; and (b) applies for and obtains an Order from this Court subjecting such person or entity to the provisions of this Final Judgment and Remedial Order as of the date of the sale or transfer. No such Order will be entered, and no sale or transfer of any Defendant's cigarette brands, brand names, cigarette product formulas or cigarette businesses (other than a sale or transfer of cigarette brands or brand names

to be sold, product formulas to be used, or cigarette businesses to be conducted, by the acquiror or transferee exclusively outside of the United States) shall be allowed, unless this Court first determines that such person or entity has the capacity to comply with the obligations contained in this Final Judgment and Remedial Order. The sale or transfer by a Defendant of any of its cigarette brands, brand names, cigarette product formulas or cigarette businesses shall not relieve that Defendant from its joint and several liability under this Final Judgment and Remedial Order.

21. **Costs.** Defendants shall pay the appropriate costs of the prevailing party, which is the Government. The Government shall serve and file a bill of costs in accordance with LCvR 54 within 30 days from this date.

It is so Ordered.

This is a final appealable Order subject to Federal Rule of Appellate Procedure 4.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5267 **September Term 2009**

99cv02496

Filed On: September 22, 2009

United States of America,
United States Department of Justice, et al.,

Appellees

v.

Philip Morris USA Inc., formerly known
as Philip Morris Incorporated, et al.,

Appellees

British American Tobacco (Investments) Ltd.,
Directly and as Successor to
BRITISH-AMERICAN TOBACCO COMPANY, LTD,

Appellant

The Council for Tobacco Research-USA, Inc., et al.,

Appellees

Consolidated with 06-5268, 06-5269, 06-5270, 06-5271, 06-5272, 06-5332, 06-5367, 07-5102, 07-5103

BEFORE: Sentelle, Chief Judge, and Tatel and Brown, Circuit Judges

ORDER

Upon consideration of the petitions of Philip Morris USA Inc., R.J. Reynolds Tobacco Co., Lorillard Tobacco Co., Altria Group Inc., and British American Tobacco (Investments) Ltd. for panel rehearing, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5267 **September Term 2009**

99cv02496

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United States of America,
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Appellees

Consolidated with 06-5268, 06-5269, 06-5270, 06-5271, 06-5272, 06-5332, 06-5367, 07-5102, 07-5103

BEFORE: Sentelle, Chief Judge, and Ginsburg,* Henderson,* Rogers, Tatel, Garland,* Brown, Griffith, and Kavanaugh,* Circuit Judges

ORDER

Upon consideration of the petitions of Philip Morris USA Inc., R.J. Reynolds Tobacco Co., Lorillard Tobacco Co., Altria Group Inc., and British American Tobacco (Investments) Ltd. for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

* Circuit Judges Ginsburg, Henderson, Garland and Kavanaugh did not participate in this matter.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5252 **September Term 2004**

99cv02496

Filed On: April 19, 2005 [889872]

United States of America,

Appellee

v.

Philip Morris USA Inc., et al.,
f/k/a Philip Morris Incorporated,

Appellants

Pharmacia Corporation and Pfizer Inc.,

Appellees

BEFORE: Ginsburg, Chief Judge, and Edwards,** Sentelle, Henderson,* Randolph, Rogers,** Tatel,** Garland,* and Roberts,* Circuit Judges

ORDER

The petition of the United States of America for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote

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* Circuit Judges Henderson, Garland, and Roberts did not participate in this matter.

** Circuit Judges Edwards, Rogers, and Tatel would grant the petition for rehearing en banc.

was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Nancy G. Dunn
Deputy Clerk

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception

contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C.A. § 1964

(3) (2)

Nos. 09-978 & 09-994

Supreme Court, U.S.
FILED
MAY 25 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

PHILIP MORRIS USA INC., ET AL.,

Respondents.

TOBACCO-FREE KIDS ACTION FUND, ET AL.,

Petitioners,

v.

PHILIP MORRIS USA INC., ET AL.,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED

DAVID L. WALLACE
BENJAMIN C. RUBINSTEIN
Chadbourne & Parke LLP
30 Rockefeller Plaza
New York, NY 10112
(212) 408-5100

ALAN UNTEREINER
Counsel of Record
ROY T. ENGLERT, JR.
MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., #411
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

Counsel for Respondent British American Tobacco (Investments) Limited

QUESTION PRESENTED

In this action for equitable relief under 18 U.S.C. § 1964(a), the government sought "disgorgement" of $280 billion, purportedly representing the proceeds of the sale of cigarettes over three decades to "youth-addicted" smokers in the United States (and the imputed profits or "additional gains" earned on those sales proceeds). The government sought that *entire amount* from each of the tobacco industry defendants, including respondent British American Tobacco (Investments) Limited ("BATCo"), even though the government's own disgorgement model acknowledged that BATCo never earned a penny in proceeds from the sale of cigarettes to "youth-addicted" smokers.

The question presented in this case is:

Whether the court of appeals correctly held that disgorgement and other backward-looking remedies were unavailable against respondent BATCo, because (1) Section 1964(a) authorizes district courts to issue only "appropriate orders" that "prevent and restrain" *future* violations of the Racketeer Influenced and Corrupt Organizations Act; (2) under the government's own disgorgement model, BATCo had received no sales proceeds (or "additional gains") that could be the subject of disgorgement; and (3) several other features of the government's disgorgement claim showed that it was a claim for *legal* rather than *equitable* restitution, and thus was outside the scope of Section 1964(a).

RULE 29.6 STATEMENT

British American Tobacco (Investments) Limited states that the following publicly held parent companies have a ten percent or greater ownership interest in it: British American Tobacco p.l.c.; British American Tobacco (1998) Limited; B.A.T Industries p.l.c.; and British-American Tobacco (Holdings) Limited.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 1

A. The Government's Disgorgement Claim 2

B. BATCo's Objections To The Government's Disgorgement Claim In The Lower Courts 4

REASONS FOR DENYING THE PETITIONS 8

I. The Government's Attempt To Win A Massive Disgorgement Award Of $280 Billion From A RICO Defendant That Concededly Never Received *Any* Unlawful Proceeds Confirms The Wisdom Of Congress's Decision To Withhold This Remedy 10

II. This Case Is A Poor Vehicle For Addressing Whether Disgorgement Is Categorically Unauthorized By Section 1964(a) Because The Government's Disgorgement Claim Falls Outside Section 1964(a) For Several Independent Reasons 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Bennett v. *Spear*, 520 U.S. 154 (1997) 16

Great-West Life & Annuity Ins. Co. v. *Knudson*, 534 U.S. 204 (2002) 6, 7, 13, 14

Mertens v. *Hewitt Assocs.*, 508 U.S. 248 (1993) 13

United States v. *Carson*, 52 F.3d 1173 (2d Cir. 1995), cert. denied, 516 U.S. 1122 (1996) 4, 5, 15

United States v. *Philip Morris USA Inc.*, 316 F. Supp. 2d 19 (D.D.C. 2004) 6, 15

Statutes and Rule

18 U.S.C. § 1964(a) ..... *passim*

28 U.S.C. § 1292(b) 6

Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009) 9

S. Ct. Rule 10 9

TABLE OF AUTHORITIES – cont'd

Page(s)

Other Authorities

1 D. DOBBS, LAW OF REMEDIES: DAMAGES – EQUITY – RESTITUTION (2d ed. 1993) 13, 14, 15

E. GRESSMAN, K. GELLER, S. SHAPIRO, T. BISHOP & E. HARTNETT, SUPREME COURT PRACTICE (9th ed. 2007) 16

RESTATEMENT OF RESTITUTION (1937) 7

U.S. DEPT. OF JUSTICE, RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS ACT: A MANUAL FOR FEDERAL PROSECUTORS (4th ed. 2000) 9

W. PAGE KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984) 15

BRIEF IN OPPOSITION FOR BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED

Respondent British American Tobacco (Investments) Limited ("BATCo") respectfully submits this brief opposing the certiorari petitions filed by the United States and by the Tobacco-Free Kids Action Fund et al. ("intervenors").

STATEMENT

BATCo fully endorses and adopts, but will not repeat here, the arguments made by respondents (and co-defendants) Philip Morris U.S.A. Inc. ("PM"), Lorillard Tobacco Co. ("Lorillard"), R.J. Reynolds Tobacco Co. ("RJR"), Brown & Williamson Holdings, Inc., and Altria Group, Inc. ("Altria") in their joint brief in opposition ("PM Opp."). In submitting this brief, BATCo wishes to highlight several features of the government's claim for disgorgement as specifically applied to BATCo that not only confirm the wisdom of Congress's decision to withhold this draconian sanction in actions brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(a), but also make this case a poor vehicle for deciding "[w]hether 18 U.S.C. 1964(a) *categorically* bars" the remedy of "disgorgement." 09-978 Pet. i (emphasis added). Even if the government were correct that Section 1964(a) authorizes disgorgement in some circumstances, the government's claim against BATCo would be barred – and the D.C. Circuit's dismissal of that disgorgement claim would be correct – for several independent reasons.

A. The Government's Disgorgement Claim

The government originally sought to disgorge from the defendants a "range of potential proceeds" from $108 billion to $742 billion. 04-5252 C.A. App. 858.[1] It later sought to disgorge "only" what it called a "lesser amount" of $280 billion; if ordered, that would have been the largest sum ever awarded to any litigant. *Id.* at 857-58. To arrive at that gargantuan figure, the government first attempted to calculate defendants' proceeds from all cigarette sales beginning in 1971 (RICO's effective date) until 2001, made to a so-called "youth-addicted population" in the United States. *Id.* at 390, 407, 600, 858. That hypothetical population, as defined by the government, included every person who was smoking five or more cigarettes a day at the time he or she turned 21, even though in the vast majority of States it is lawful to sell cigarettes to a person who is 18 or older. *Ibid.*; see also *id.* at 587-91. The government requested disgorgement of *all* the proceeds from *every* cigarette ever sold to such a person during his or her *entire life*. *Id.* at 490-91.

But the government did not stop there. In addition to requesting disgorgement of these historical sales proceeds, it *also* sought disgorgement of "additional gains due to the use" of these sale proceeds "over time" (in effect, imputed earnings or profits on the proceeds). 04-5252 C.A. App. 392; see also *id.* at 396-99, 458-59. To calculate these "additional gains," the government used an average annual rate of re-

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[1] All citations herein to the Appendix in the Court of Appeals are to the Appellants' Appendix filed in the interlocutory appeal (D.C. Cir. No. 04-5252).

turn of 12.1%. *Id.* at 399. As a result, fully 73% of the $280 billion sought by the government consisted of "additional gains." See United States Opposition to Defendants' Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim, at 14 (D.D.C. Oct. 7, 2003) (calculating that "$75.49 billion represent[ed] the contemporaneous value of the proceeds and $204.39 billion [was] the adjustment that account[ed] for the time value of money, or Defendants' additional gains").

The government designated two expert witnesses, Dr. Franklin Fisher and Dr. Jonathan Gruber, in support of its disgorgement demand. Both Dr. Fisher and Dr. Gruber testified that the government's estimate of sales proceeds was not limited to *illegally* obtained gains. Dr. Fisher explained: "My part . . . was to estimate the proceeds on sales to the [youth-addicted population] . . . without regard for the question of whether they were earned illegally." 04-5252 C.A. App. 714. Similarly, Dr. Gruber testified that his disgorgement analysis was not limited to the scope of the alleged legal violation: "[T]he effect of the RICO violation was outside what I was asked to do." *Id.* at 727.

The government contended that each of the defendants was jointly and severally liable for the entire $280 billion. At the same time, Dr. Fisher's calculations and model were based on the proceeds of sales solely by the six defendants that manufactured cigarettes for the U.S. market during the relevant time period, namely PM (to which Fisher attributed $159 billion in sales proceeds and "additional gains"), Lorillard ($23 billion), RJR ($64 billion), Liggett ($2 billion), Brown & Williamson Tobacco Company ($30

billion), and American Tobacco Co. ($10 billion). 04-5252 C.A. App. 470. Significantly, the government's disgorgement model attributed *no* sales proceeds to respondent BATCo (or to Altria, a holding company). Nevertheless, as noted above, the government took the position that it was entitled to obtain the entire $280 billion in disgorgement from BATCo.

B. BATCo's Objections To The Government's Disgorgement Claim In The Lower Courts

1. BATCo and its co-defendants moved for summary judgment on the government's disgorgement claim. In addition to contending that disgorgement is *never* an available remedy under Section 1964(a), BATCo argued that the government's claim against BATCo was legally defective because it failed in several important respects to conform to the traditional limits on the equitable remedy of disgorgement. For example, the government had offered no proof as to "what portions of Defendants' gains [were] ill-gotten," and, accordingly, had "fail[ed] to satisfy the most basic criterion of a traditional measure of disgorgement: money acquired from unlawful conduct." Defendants' Brief in Support of Their Motion for Partial Summary Judgment Dismissing the Government's Disgorgement Claim, at 8, 12 (D.D.C. Aug. 1, 2003). Defendants further contended that the government's disgorgement claim failed under *United States* v. *Carson*, 52 F.3d 1173 (2d Cir. 1995), cert. denied, 516 U.S. 1122 (1996), which reversed a disgorgement award under Section 1964(a) on the ground that any disgorgement remedy authorized by that provision would have to be limited to gains that were "being used to fund or promote the illegal conduct, or constitute capital available for that purpose." 52 F.3d at

1182. (That standard could never be satisfied with respect to a RICO defendant, such as BATCo, that never derived any proceeds in the first place.) The district court rejected the argument that disgorgement is not an available remedy under Section 1964(a) and deferred until trial the questions raised about the legal adequacy of the government's disgorgement model. 09-978 Pet. App. 177a-195a.

The government also filed a motion for partial summary judgment on whether the defendants were jointly and severally liable for the requested $280 billion in disgorgement of sales proceeds (and "additional gains"). In an opposition to that motion jointly filed by the defendants, as well as in BATCo's separate motion for summary judgment, BATCo argued that joint and several liability was wholly inappropriate because the government's own experts had already apportioned the alleged liability among the co-defendants – and, significantly, had attributed *none* of the proceeds of U.S. sales to youth-addicted smokers to BATCo. See, *e.g.*, Memorandum of Law in Support of BATCo's Motion for Summary Judgment, at 6 (D.D.C. Oct. 8, 2003). Under these circumstances, BATCo maintained, the application of joint and several liability to BATCo marked a further departure from the traditional limits on disgorgement and would result in the imposition of "an 'additional penalty' of up to [a $280] billion judgment." *Id.* at 28. That result was fundamentally inconsistent with the equitable remedy of disgorgement, BATCo explained, because it would be "clearly punitive" in nature. *Ibid.*[2] In response, the government argued vigorously

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[2] See also Defendants' Memorandum of Points and Authorities in Opposition to the Government's Motion for Partial Summary Judgment, at

for joint and several liability and reiterated its claimed entitlement to seek *the entire $280 billion* from *each* co-defendant, including BATCo. The district court agreed with the government. *United States* v. *Philip Morris USA Inc.*, 316 F. Supp. 2d 19, 26-29 (D.D.C. 2004).

2. On interlocutory appeal under 28 U.S.C. § 1292(b), BATCo and the other defendants argued that disgorgement is legally unavailable under Section 1964(a). See 04-5252 Appellants' Br. 8-11, 13-46. In the alternative, they contended that the government's disgorgement claim failed under *Carson*. *Id.* at 53-55. Finally, they renewed their arguments that, even if Section 1964(a) authorizes disgorgement in some circumstances, it does not authorize the government's claim to joint and several disgorgement of $280 billion in this case, especially against BATCo. 04-5252 Appellants' Br. 46-51, 56-58 & nn.12-16.

Section 1964(a), BATCo and the other defendants explained, is limited to *equitable* remedies, but the government's disgorgement claim was *legal* in nature. In *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204 (2002), this Court made clear that claims for the payment of money are rarely equitable claims. "Almost *invariably*," this Court explained, "suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money . . . are suits for money damages. . . ." *Id.* at 210 (emphasis added) (internal quotation marks and citation omitted). Nor does it mat-

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22 (D.D.C. Sept. 2, 2003) (citing BATCo's example and arguing that "[s]uch a drastic difference between the liability imposed upon each defendant and its alleged ill-gotten gain would render any award not a remedy but a penalty, which is not permitted under civil RICO").

ter, this Court further held, that the monetary remedy is deemed "restitutionary." Restitution is a *legal* remedy where the plaintiff does not seek specific relief – *i.e.*, the return of "*particular* funds or property" – but rather (as here) seeks to impose "a merely personal liability upon the defendant to pay a sum of money." *Id.* at 213, 215 (emphasis added) (quotation marks omitted).[3] Notably, the government in this case does not seek to return to youth-addicted smokers the proceeds of defendants' cigarette sales. Rather, the government seeks simply a lump-sum award for itself.

In addition, BATCo contended, the legal nature of the government's disgorgement claim is confirmed by the government's: pursuit of joint and several liability (a doctrine developed in the law of torts that has no basis in equity); refusal to limit its claim to proceeds that were the result of illegal activity; and attempt to disgorge sales "proceeds" (and imputed "additional gains" thereon) from certain defendants (including BATCo) that under the government's own model indisputably *never received any sales proceeds in the first place* (much less additional gains). Such sweeping relief is manifestly inconsistent with the historic limitations on the disgorgement remedy, as to which the actual receipt of ill-gotten gains by a particular defendant was a prerequisite. Accordingly, BATCo argued, the government's disgorgement claim in this case falls outside of Section 1964(a).

The court of appeals held that disgorgement is not an available remedy under Section 1964(a). The

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[3] See RESTATEMENT OF RESTITUTION § 215, at 866 (1937) (pointing to the "necessity of tracing property" to assert equitable remedies, as opposed to "merely a personal claim").

court did not reach any of BATCo's alternative arguments. See 09-978 Pet. App. 99a-176a.

REASONS FOR DENYING THE PETITIONS

This truly is a case of "déjà vu all over again." More than five years ago, the D.C. Circuit resolved an interlocutory appeal in this case by holding that the government may not pursue disgorgement under 18 U.S.C. § 1964(a). The United States filed a petition for certiorari in which it raised all of the same arguments advanced in its current petition. In October 2005, this Court denied the government's first petition. See 546 U.S. 960. In May 2009, following trial, the D.C. Circuit again rejected the government's appeal (joined now by intervenors) concerning the denial of the disgorgement claim and reaffirmed its prior ruling "as the law of the case." 09-978 Pet. App. 90a. The government did not renew its request for rehearing en banc (which had been denied in 2005).

In the more than five years since the D.C. Circuit issued its disgorgement decision, no other court of appeals has addressed the supposedly "exceptionally important" issues raised by the government's and intervenors' petitions. 09-978 Pet. 14; 09-994 Pet. 20. The purported circuit conflict claimed five years ago by the government – which for reasons explained by BATCo's co-defendants (PM Opp. 8, 23-26) and in the previous brief in opposition (05-92 Opp. 1, 24-26) is at best academic and at worst illusory – has shown no signs of "deepening." The D.C., Second, and Fifth Circuits all agree that disgorgement is unavailable in a case such as this, and no appellate court has ever allowed disgorgement in a civil RICO action.

To say that the issue arises rarely is an understatement. Only the federal government may bring a civil action seeking the remedies authorized by 18 U.S.C. § 1964(a). By the government's own count, it has filed a grand total of approximately 36 such actions in the first 30 years of RICO's existence. See U.S. DEPT. OF JUSTICE, RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS ACT: A MANUAL FOR FEDERAL PROSECUTORS 290-97 (4th ed. 2000). Only a handful of those suits have even sought disgorgement as a remedy. See *id.* at 287-88 & n.12. No wonder that the most the government can claim is that the issues presented by its petition "have exceptional importance *to this case*." 09-978 Pet. 14 (emphasis added); *id.* at 29 ("a question of preeminent importance in the context of this case"). If that is what is meant by S. Ct. Rule 10's reference to "important federal questions," this Court's work would never be done.

Moreover, the government's arguments for this Court's review are even weaker today than they were five years ago. Today, for example, the government can no longer say that "the interlocutory character in this instance heightens, rather than diminishes, the need for this Court's review." 05-92 Pet. Reply Br. 7. And, as BATCo's co-defendants correctly point out (PM Opp. 13, 31), in the intervening years Congress has enacted a statute – the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009) – that confirms the absence of any need for the disgorgement sought by the government in this case. Tellingly, Congress has taken no action to overrule the D.C. Circuit by amending Section 1964(a) to authorize disgorgement. Although the current petitions (unlike the prior gov-

ernment petition) implicate several other backward-looking remedies (relating to smoking cessation and public education), neither the government nor intervenors point to any circuit conflict on those remedies or suggest that those remedies might be authorized by Section 1964(a) even if disgorgement is not. Review should be denied just as it was five years ago.

I. The Government's Attempt To Win A Massive Disgorgement Award Of $280 Billion From A RICO Defendant That Concededly Never Received *Any* Unlawful Proceeds Confirms The Wisdom Of Congress's Decision To Withhold This Remedy

This case starkly illustrates the wisdom of Congress's decision – clearly reflected in the text, structure, and origins of RICO – to withhold from the federal government the remedy of disgorgement under Section 1964(a). Even in this lawsuit seeking to extend RICO liability into novel terrain, the government has at every turn sought to stretch Section 1964(a)'s remedies far beyond their limits. Thus, the government initially suggested it would seek disgorgement of up to $742 billion based on the entire proceeds of sales by the U.S. cigarette industry to "youth addicted" smokers in the United States over a thirty-year period. Later, the government scaled back that breathtaking demand to a merely astonishing $280 billion – an amount that would have been the largest sum ever awarded to any litigant.

The government's disgorgement model, moreover, was hardly a model of restraint. For example, the government sweepingly defined the "youth addicted population" in the United States to include every person who smoked five or more cigarettes a day when

he or she turned 21, even though in most States it is lawful to sell cigarettes to a person who is 18 or older. Nonetheless, the government requested disgorgement of *all* the proceeds from *every* cigarette ever sold to such a person during his or her *entire* lifetime. Nor did the government ask its experts to limit their model to proceeds that had been *illegally* obtained. Instead, the government claimed an entitlement to *all* proceeds from the "youth addicted population," *whether or not* those sales were the result of RICO violations or other unlawful activities.

Nor was the government content merely to demand the entire $75.49 billion in the contemporaneous value of the proceeds under its novel model of disgorgement. Instead, it also sought to recoup phantom "additional gains" – never actually earned by the companies in question – of an additional $204.39 billion. More remarkably still, the government sought those "additional gains" from BATCo, which indisputably had never received any portion of the $75.49 billion in contemporaneous proceeds in the first place.

The government's pursuit of the entire $280 billion against *each and every defendant* – including those, such as BATCo, that according to the government's own model derived *no* proceeds from sales to the "youth addicted" population – revealed the true boundlessness of its zeal to stretch RICO well beyond its breaking point. Even though Section 1964(a) is plainly limited to *equitable* remedies that serve to "prevent and restrain" future violations of RICO, the government has requested a remedy of $280 billion against BATCo alone based on predicate acts of racketeering consisting of eleven unpublished communications made before 1984 – more than 15 years before

this suit was initiated – between BATCo in England and its then-U.S. subsidiary/affiliate Brown & Williamson Tobacco Company, which is now a passive holding company. See 09-980 BATCo Pet. 3-5 & nn.3-4. The government has never articulated how an order requiring disgorgement of *$280 billion* could possibly be needed to "prevent and restrain" BATCo's *future* violations of RICO under these circumstances.

As we explain below, the government's $280 billion disgorgement claim against BATCo represents a radical departure in multiple ways from the traditional limits on the remedy of equitable restitution, including disgorgement. Even apart from those features that take its claim far outside of Section 1964(a), the fact that the government is asking for this relief against BATCo with a straight face merely underscores the wisdom of the D.C. Circuit's ruling on disgorgement and of Congress's apparent desire to let that ruling stand.

II. This Case Is A Poor Vehicle For Addressing Whether Disgorgement Is Categorically Unauthorized By Section 1964(a) Because The Government's Disgorgement Claim Falls Outside Section 1964(a) For Several Independent Reasons

The government asks this Court to grant review to decide "[w]hether 18 U.S.C. 1964(a) *categorically* bars" the remedy of "disgorgement of ill-gotten gains." 09-978 Pet. i (emphasis added). This case, however, is not a good vehicle for answering that question. The reason is straightforward: Even if Section 1964(a) does not categorically preclude the remedy of equitable disgorgement, it does not authorize the highly unusual disgorgement claim advanced by

the government in this case, especially the government's disgorgement claim against BATCo. For that reason, if review is granted the Court is likely to affirm on other grounds without ever reaching the issue presented in the government's petition.

A. It is common ground that Section 1964(a) of RICO is limited to *equitable* remedies. But as this Court held in *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204 (2002), claims for the *payment of money* are rarely equitable in nature. "Almost *invariably*," this Court there explained, "suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money . . . are suits for money damages . . . ." *Id.* at 210 (emphasis added) (internal quotation marks omitted). Money damages are, "'of course, the classic form of *legal* relief.'" *Ibid.* (quoting *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255 (1993)). Under the standard set forth in *Great-West*, restitution is a *legal* remedy where the plaintiff does not seek specific relief – *i.e.*, the return of "particular funds or property" – but rather seeks to impose "a merely personal liability upon the defendant to pay a sum of money." *Id. at* 213, 215 (internal quotation marks omitted).

Great-West also candidly acknowledged that this Court's previous cases had not "drawn [a] fine distinction between restitution at law and restitution in equity" and had too casually characterized restitution in general as "equitable." 534 U.S. at 214-15. Moreover, the equitable species of restitution is subject to certain historical limitations. For example, traditionally it has been available only to restore particular property that has been taken from the plaintiff. See 1 D. DOBBS, LAW OF REMEDIES: DAMAGES –

EQUITY – RESTITUTION § 4.1(1), at 551 (2d ed. 1993) ("Restitution is a *return* or *restoration* of what the *defendant has gained in a transaction.*") (emphasis added); *Great-West*, 534 U.S. at 213 (restitution in equity was limited to situations where "money or property identified as belonging in good conscience to the plaintiff could clearly be *traced* to particular funds or property *in the defendant's possession*") (emphasis added); see also note 3, *supra*. Accordingly, equitable restitution presupposes the actual receipt of ill-gotten gains by a particular defendant.

B. In the wake of *Great-West*, it is clear that the type of restitutionary relief the government seeks in this case is *not* an equitable remedy but rather a legal one. As such, it is unauthorized by Section 1964(a) even if that provision might permit other types of restitutionary remedies in circumstances different from those presented here. Indeed, the government's disgorgement claim against BATCo strayed from the historical limits on equitable restitution in a number of ways. First, it sought a money award from BATCo and the other defendants rather than the return of specific property taken from youth-addicted smokers. Second, it sought to have that money paid to the U.S. government, not returned to the smokers themselves. Third, it sought to obtain the disgorgement of funds that were not limited to the proceeds of *unlawful* activity. Fourth, the government's claim for disgorgement *against BATCo* was also invalid because even the government's own model acknowledged that BATCo received no sales proceeds that could possibly be the subject of disgorgement. Because BATCo received no such proceeds, it also could not possibly have received any "additional gains," imputed or otherwise, on those proceeds. The government's effort to

obtain disgorgement of phantom sales proceeds and phantom "additional gains" on a *joint and several* basis from BATCo is thus manifestly inconsistent with the historic limitations on the disgorgement remedy. 1 DOBBS, *supra*, § 4.1(1), at 551 ("Restitution is a return or restoration of what the *defendant has gained in a transaction*.") (emphasis added).[4]

C. Finally, the government's disgorgement claim against BATCo independently fails under the reasoning set forth in *United States* v. *Carson*, 52 F.3d 1173 (2d Cir. 1995), cert. denied, 516 U.S. 1122 (1996). There, the Second Circuit held that any disgorgement remedy authorized by Section 1964(a) would be limited to gains that were "being used to fund or promote the illegal conduct, or constitute capital available for that purpose." *Id.* at 1182. That standard plainly cannot be satisfied with respect to a RICO defendant, such as BATCo, that has never derived any proceeds to begin with.

For all of these reasons, this case is an exceedingly poor vehicle for attempting to resolve the disgorgement issue presented in the government's peti-

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[4] Joint and several liability developed in tort law, not in equity, and it was aimed at ensuring full compensation to an injured plaintiff. See W. PAGE KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 346 (5th ed. 1984). Disgorgement, in contrast, is not aimed at compensation. The district court's reliance on treble-damages and forfeiture actions in upholding the government's joint-and-several-liability theory, see *United States* v. *Philip Morris USA Inc.*, 316 F. Supp. 2d 19, 26-29 (D.D.C. 2004), was therefore completely misplaced. Moreover, the government's attempt to impose a $280 billion disgorgement remedy jointly and severally *on each of the defendants* – regardless of whether they received *any* ill-gotten proceeds or "additional gains" – ignores Congress's command that any remedy imposed under Section 1964(a) be specifically calibrated to "prevent and restrain" future RICO violations by each defendant individually.

tion. If the Court nevertheless grants review of the disgorgement question, BATCo will ask the Court to affirm the invalidation of the disgorgement claim against BATCo on multiple alternative grounds. See *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997) ("[a] respondent is entitled . . . to defend the judgment on any ground supported by the record"); E. GRESSMAN, K. GELLER, S. SHAPIRO, T. BISHOP & E. HARTNETT, SUPREME COURT PRACTICE § 6.35, at 489-90 (9th ed. 2007).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

DAVID L. WALLACE
BENJAMIN C. RUBINSTEIN
Chadbourne & Parke LLP
30 Rockefeller Plaza
New York, NY 10112
(212) 408-5100

ALAN UNTEREINER
Counsel of Record
ROY T. ENGLERT, JR.
MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

Counsel for Respondent British American Tobacco (Investments) Limited

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IN THE

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UNITED STATES OF AMERICA,

Petitioner,

v.

PHILIP MORRIS USA INC.
(f/k/a Philip Morris, Inc.), ET AL.,

Respondents.

TOBACCO-FREE KIDS ACTION FUND, ET AL.,

Petitioners,

v.

PHILIP MORRIS USA INC.
(f/k/a Philip Morris, Inc.), ET AL.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

MICHAEL A. CARVIN
Counsel of Record
ROBERT F. MCDERMOTT, JR.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Respondent R[illegible] Reynolds Tobacco Company

MIGUEL A. ESTRADA
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Respondent Philip Morris USA Inc.

[Additional Counsel Listed on Inside Cover]

MICHAEL B. MINTON
Counsel of Record
BRUCE D. RYDER
JASON A. WHEELER
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000
mminton@thompsoncoburn.com

ROBERT A. LONG, JR.
JONATHAN L. MARCUS
MARK W. MOSIER
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

Counsel for Respondent Lorillard Tobacco Company

DOUGLAS G. SMITH, P.C.
Counsel of Record
RENEE D. SMITH
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654
(312) 862-2000
douglas.smith@kirkland.com

Counsel for Respondent Brown & Williamson Holdings, Inc.

GUY MILLER STRUVE
Counsel of Record
CHARLES S. DUGGAN
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4192
guy.struve@davispolk.com

Counsel for Respondent Altria Group, Inc.

QUESTION PRESENTED

Whether the court of appeals correctly held that disgorgement and other backward-looking remedies are unavailable under 18 U.S.C. § 1964(a), which authorizes district courts to issue only "appropriate orders" that "prevent and restrain" violations of the Racketeer Influenced and Corrupt Organizations Act.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that:

Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock.

Altria Group, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

R.J. Reynolds Tobacco Company is directly and wholly owned by R.J. Reynolds Tobacco Holdings, Inc. (a Delaware corporation). R.J. Reynolds Tobacco Holdings, Inc. is a direct, wholly owned subsidiary of Reynolds American, Inc., a publicly traded corporation. Brown & Williamson Holdings, Inc. owns more than 10% of the common stock of Reynolds American, Inc.

Brown & Williamson Holdings, Inc. is an indirect, wholly owned subsidiary of British American Tobacco p.l.c., and no other publicly held company owns 10% or more of its stock.

Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc. Lorillard, Inc. is the only publicly held company that owns 10% or more of Lorillard Tobacco Company's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR DENYING THE PETITIONS 9

I. THE COURT OF APPEALS' INTERPRETATION OF SECTION 1964(a) IS CONSISTENT WITH THIS COURT'S PRECEDENT 10

A. The Text Of Section 1964(a) And RICO's Comprehensive Remedial Framework Exclude Disgorgement And Other Backward-Looking Remedies 10

B. This Court's Precedent Confirms That Backward-Looking Remedies Are Unavailable Under Section 1964(a) 18

II. THE QUESTIONS PRESENTED DO NOT IMPLICATE A CIRCUIT SPLIT 23

III. THE D.C. CIRCUIT'S REMEDIAL HOLDING HAS LIMITED IMPORTANCE OUTSIDE THIS UNPRECEDENTED LITIGATION 27

CONCLUSION 31

STATUTORY APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987) 14

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 20

CFTC v. Wilshire Inv. Mgmt. Co., 531 F.3d 1339 (11th Cir. 2008) 26

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990) 12

Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004) 17

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 13

Ford Motor Co. v. United States, 405 U.S. 562 (1972) 15

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) 16, 29

Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992) 14

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) 16

Leocal v. Ashcroft, 543 U.S. 1 (2004) 11

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 7

Meghrig v. KFC Western, Inc.,
516 U.S. 479 (1996) 6, 21, 22, 23

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) 11

Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) 22

Mitchell v. Robert DeMario Jewelry, Inc.,
361 U.S. 288 (1960) 2, 16, 20, 26, 30

Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers,
414 U.S. 453 (1974) 17

Nw. Airlines v. Transp. Workers Union of Am., 451 U.S. 77 (1981) 16

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 2, 10, 17, 18, 19, 26, 30

Respass v. Commonwealth,
115 S.W. 1131 (Ky. 1909) 19

Reves v. Ernst & Young,
507 U.S. 170 (1993) 14

Richard v. Hoechst Celanese Chem. Group, Inc., 355 F.3d 345
(5th Cir. 2003) 25

Switchmen's Union of N. Am. v. Nat'l Mediation Bd.,
320 U.S. 297 (1943) 16

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 14

Tull v. United States,
481 U.S. 412 (1987) 12, 30

United States v. Bajakajian,
524 U.S. 321 (1998) 31

United States v. Carson,
52 F.3d 1173 (2d Cir. 1995) 24, 28

United States v. Lane Labs-USA Inc.,
427 F.3d 219 (3d Cir. 2005) 27

United States v. Philip Morris Inc.,
116 F. Supp. 2d 131 (D.D.C. 2000) 5

United States v. Philip Morris USA Inc.,
546 U.S. 960 (2005) 7

United States v. Philip Morris USA Inc.,
396 F.3d 1190 (D.C. Cir.), *cert. denied*,
546 U.S. 960 (2005) 2

United States v. Rx Depot, Inc.,
438 F.3d 1052 (10th Cir. 2006) 27

United States v. Standard Oil Co. of Cal.,
332 U.S. 301 (1947) 30

United States v. Turkette,
452 U.S. 576 (1981) 20

STATUTES

Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009) 13, 31

15 U.S.C. § 4 14

15 U.S.C. § 25 14

15 U.S.C. § 78u(d)(5) 26

18 U.S.C. § 1963(a) 4

18 U.S.C. § 1964(a) 4, 10, 11

18 U.S.C. § 1964(b) 17

18 U.S.C. § 1964(c) 4

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1395y(b)(2) 4

42 U.S.C. § 2651(a) 4

42 U.S.C. § 6972(a) 21, 23

42 U.S.C. § 6972(f) 23

OTHER AUTHORITIES

Administrative Office of the United States Courts, *2008 Annual Report of the Director* (2009) 28

Restatement (First) of Restitution (1937) 29

S. Rep. No. 91-617 (1969) 19

Webster's New International Dictionary (2d ed. 1955) 11

World Bank, World Development Indicators Database, *at* http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf 28

67 Fed. Reg. 12,090 (Mar. 18, 2002) 15

BRIEF IN OPPOSITION

Respondents Philip Morris USA Inc. ("PM USA"), R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, Brown & Williamson Holdings, Inc., and Altria Group, Inc. respectfully submit this brief in opposition to the petitions for writs of certiorari filed by the United States and by the Tobacco-Free Kids Action Fund et al. ("intervenors").

OPINIONS BELOW

The court of appeals' opinions are reported at 566 F.3d 1095 (U.S. Pet. App. 1a) and 396 F.3d 1190 (U.S. Pet. App. 99a). The opinions of the United States District Court for the District of Columbia are reported at 449 F. Supp. 2d 1 (U.S. Pet. App. 258a; Defs.' Pet. App. 101a), 321 F. Supp. 2d 72 (U.S. Pet. App. 177a), and 116 F. Supp. 2d 131 (U.S. Pet. App. 196a).

JURISDICTION

The court of appeals filed its final opinion on May 22, 2009. It denied respondents' timely petitions for rehearing or rehearing en banc, and a related suggestion of mootness, on September 22, 2009. On December 11 and 15, 2009, the Chief Justice extended the time for the government and intervenors to file petitions for writs of certiorari to and including February 19, 2010. Nos. 09A572, 09A573. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, is set forth in full in the appendix to PM USA's petition for a writ of certiorari (No. 09-976). Sections 1963 and

1964 of RICO are reproduced in the appendix to this brief in opposition.

STATEMENT

This is not the first time that petitioners' questions presented have come before the Court in this case. In 2005, the Court declined to review the D.C. Circuit's interlocutory decision that the government cannot obtain disgorgement and other backward-looking remedies under Section 1964(a) of RICO—a provision limited to relief that "prevent[s] and restrain[s]" RICO violations. *United States v. Philip Morris USA Inc.*, 396 F.3d 1190 (D.C. Cir.), *cert. denied*, 546 U.S. 960 (2005) (U.S. Pet. App. 99a).

The D.C. Circuit reaffirmed that decision last year (U.S. Pet. App. 1a), and the government, joined by intervenors, now seeks for a second time this Court's review of that holding. But petitioners identify no developments in the law of RICO that call into question the court of appeals' holding or this Court's decision to deny review. As in 2005, it remains the case that the government pursues disgorgement under Section 1964(a) only exceptionally rarely, that *no* appellate court has ever adopted petitioners' sweeping argument that the provision authorizes purely backward-looking remedies, and that *every* court of appeals that has addressed the argument has rejected it.

Indeed, in the forty years since RICO was enacted, only three courts of appeals have addressed the potential availability of disgorgement under the narrow language of Section 1964(a). Not a single one of those circuits has agreed with the government's argument here: that *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), require that dis-

gorgement be broadly available under RICO. Instead, as intervenors concede, all three circuits to consider the question have concluded that "*any* § 1964(a) remedy must address *future* illegal acts." Int. Pet. 17 (emphases in original).

No circuit has adopted the government's arguments under *Porter* and *Mitchell* for good reason: the text and structure of RICO plainly provide that disgorgement and other backward-looking relief cannot be awarded under Section 1964(a). The availability of such relief would not only nullify Section 1964(a)'s "prevent and restrain" language but also circumvent RICO's comprehensive remedial framework. As the court of appeals explained, *other* provisions of RICO provide mechanisms for separating an alleged racketeer from its ill-gotten gains, but those provisions impose procedural protections—including trial by jury—that are inapplicable under Section 1964(a). The government seeks to circumvent those procedural requirements here by obtaining in a Section 1964(a) action tried before a single district court judge a punitive order forfeiting $280 *billion* of defendants' past profits.

Accordingly, as it has done once before, the Court should deny review because the questions presented do not implicate a conflict with the precedent of this Court or other courts and have limited significance outside the "unique" context of this case. Int. Pet. 15.

1. On the same day in 1999 that it announced the termination of a grand jury investigation of defendants without seeking an indictment, the government filed this suit against the major domestic tobacco companies and two industry organizations. The government brought claims under the Medical

Care Recovery Act, 42 U.S.C. § 2651(a), and Medicare Secondary Payer statute, *id.* § 1395y(b)(2), seeking billions of dollars in damages for smoking-related health-care costs.

The government also alleged that defendants had violated RICO by forming an "associated in fact" enterprise that undertook a decades-long campaign to mislead the American public about the health effects and addictiveness of smoking. In framing its RICO claim, the government did not invoke any of the provisions that explicitly authorize monetary relief for past RICO violations, including RICO's criminal forfeiture provision (18 U.S.C. § 1963(a))—which requires a jury trial and proof beyond a reasonable doubt—or its civil treble-damages provision (*id.* § 1964(c))—which requires a jury trial and proof of a nonremote injury proximately caused by the defendant's conduct.

The government instead brought suit under Section 1964(a) of RICO. That provision—which provides for trial before a single district court judge and does not require proof beyond a reasonable doubt or a showing of proximate cause—grants district courts jurisdiction to issue only "appropriate orders" that "*prevent and restrain*" RICO violations. 18 U.S.C. § 1964(a) (emphasis added). The government did not limit itself, however, to seeking equitable remedies aimed at preventing and restraining future RICO violations. The government sought both sweeping injunctive relief and the purported "disgorgement" of $280 *billion* in *past* profits that defendants had earned from cigarette sales since 1971, the year after RICO was enacted.

The district court eventually dismissed the government's statutory claims for the recovery of health-

care costs (*United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131, 135 (D.D.C. 2000)), but denied defendants' motion to dismiss the RICO disgorgement claim, and their subsequent motion for summary judgment, on the ground that "disgorgement is a permissible remedy under Section 1964(a)." U.S. Pet. App. 183a n.7.

2. The district court certified its summary judgment ruling on the disgorgement claim for interlocutory appeal to the D.C. Circuit.

The D.C. Circuit reversed. The court of appeals held that "the language of § 1964(a) and the comprehensive remedial scheme of RICO preclude disgorgement as a possible remedy in this case." U.S. Pet. App. 110a. The court explained that jurisdiction under Section 1964(a) to "prevent and restrain" RICO violations "is limited to forward-looking remedies that are aimed at future violations." *Id.* at 113a. The meaning of the "prevent and restrain" limitation, the court continued, is confirmed by the fact that the three remedies explicitly mentioned in Section 1964(a)—divestiture, injunctions "restrict[ing] . . . future activities," and dissolution—"are all aimed at separating the RICO criminal from the enterprise so that he cannot commit violations *in the future*." *Id.* (emphasis in original). In contrast with these examples, "[d]isgorgement . . . is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo," and is therefore unavailable under Section 1964(a). *Id.* at 113a-14a.

In reaching this conclusion, the D.C. Circuit rejected the government's argument that Section 1964(a) is "a plenary grant of equitable jurisdiction." U.S. Pet. App. 114a. The court of appeals ex-

plained that the government's open-ended reading of the statute "not only nullifies the plain meaning of the terms ['prevent' and 'restrain'] and violates our canon of statutory construction that we should strive to give meaning to every word, but also neglects Supreme Court precedent." *Id.* (citations omitted). The court specifically relied on *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), where this "Court held that compensation for past environmental cleanup was ruled out by the plain language of the Resource Conservation and Recovery Act which authorized actions 'to restrain' persons who were improperly disposing of hazardous waste." U.S. Pet. App. 114a. "If 'restrain' is only aimed at future actions," the court reasoned, "'prevent' is even more so." *Id.*

Finally, the court of appeals reasoned that "[p]ermitting disgorgement under § 1964(a) would . . . thwart Congress' intent in creating RICO's elaborate remedial scheme." U.S. Pet. App. 119a. "The disgorgement requested here is similar in effect to the relief mandated under the criminal forfeiture provision, § 1963(a), without requiring the inconvenience of meeting the additional procedural safeguards that attend criminal charges," and would permit the government to "collect sums paralleling—perhaps exactly—the damages available to individual victims under § 1964(c)." *Id.* at 118a. The government's disgorgement request therefore "raise[d] issues of duplicative recovery of exactly the sort that . . . constitute[ ] a basis for refusing to infer a cause of action not specified by the statute." *Id.* at 118a-19a.

Judge Williams joined the opinion of the court of appeals in full. He wrote separately to highlight the shortcomings in the remedial approach—suggested by some appellate courts but never applied by *any* of

those courts—that would permit a limited form of disgorgement restricted to ill-gotten gains that remain available to fund future RICO violations. U.S. Pet. App. 122a-23a. Judge Tatel dissented, adopting the government's expansive reading of Section 1964(a). *Id.* at 135a. The D.C. Circuit denied the government's petition for rehearing en banc without opinion.

The government then filed a petition for a writ of certiorari, asking this Court to decide "[w]hether the district court's equitable jurisdiction to issue 'appropriate orders' to 'prevent and restrain' violations of [RICO] encompasses the remedial authority to order disgorgement of illegally-obtained proceeds." Pet. i (No. 05-92). This Court denied review. *United States v. Philip Morris USA Inc.*, 546 U.S. 960 (2005).

3. After a nine-month bench trial, the district court ruled that defendants had violated RICO by associating together to form a racketeering enterprise and committing predicate acts of mail and wire fraud in the form of false statements about the health risks and addictiveness of smoking. The district court also ruled that defendants were likely to commit further RICO violations in the future—even though the "landmark" Master Settlement Agreement ("MSA") between the States and the tobacco industry had already prohibited defendants from jointly engaging in the decades-old conduct that formed the basis for the government's suit. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001).

With input from intervenors—who were permitted to participate in the case solely on remedial issues—the district court crafted a series of sweeping injunctions to "prevent and restrain" future RICO

violations by defendants. Among other things, those injunctions require defendants to remove "light" and "low tar" descriptors from the packages and brand names of their cigarettes, to comply with new and burdensome document disclosure obligations well beyond those already imposed by the MSA, and generally to obey the law by refraining "from engaging in any act of racketeering . . . relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes." U.S. Pet. App. 391a.

Based on the D.C. Circuit's decision identifying the limits of Section 1964(a), however, the district court rejected petitioners' request that it order defendants to fund a smoking-cessation program and nationwide public education campaign because those remedies were not "aimed at preventing and restraining future RICO violations." U.S. Pet. App. 392a, 399a.

4. On appeal from the final judgment, the D.C. Circuit affirmed in all significant respects.

The court of appeals reiterated its "denial of [petitioners'] request for disgorgement," which the court "affirm[ed] as the law of the case." U.S. Pet. App. 90a. It also upheld the district court's refusal to order defendants to fund a smoking-cessation program and public education campaign. *Id.* at 92a. The court explained that programs to reduce cigarette sales do not "prevent and restrain" violations of RICO because "[f]uture cigarette sales, even to addicted smokers, are not by themselves RICO violations." *Id.* "The proposed remedies," the court continued, "attempt to prevent and restrain future effects of past RICO violations, not *future* RICO violations[;] therefore they are outside the district court's

authority under section 1964(a)." *Id.* (emphasis added).

The court added that, even if the proposed smoking-cessation program and public education campaign "would eliminate Defendants' incentive to market their products fraudulently by shrinking Defendants' customer base," such "general deterrence remedies [are] aimed ... wide of the statutorily-ordained mark." U.S. Pet. App. 93a, 94a. Section 1964(a) authorizes "injunctions to prevent and restrain fraudulent statements about smoking and health and addiction," the court concluded, "not to prevent Defendants from marketing and selling their products at all." *Id.* at 94a.

REASONS FOR DENYING THE PETITIONS

As was the case when this Court denied review in 2005, none of the traditional criteria for certiorari is met here. The D.C. Circuit's remedial decision is fully consistent with this Court's decisions, which require courts to analyze the text and structure of each statute, because the plain text and structure of RICO plainly preclude disgorgement and other backward-looking remedies. The courts of appeals that have examined the text and structure of RICO have unanimously rejected the government's broad submission here and agreed with the decision below that Section 1964(a) addresses only future RICO violations. And, any disagreement between the decision below and decisions suggesting that a limited form of RICO disgorgement *might be* available under some circumstances, if tailored to address future RICO violations, is purely academic because petitioners explicitly *reject* the limitations on disgorgement imposed by the Second and Fifth Circuits. Finally, as shown by the fact that this issue has produced a

mere three appellate decisions in four decades, the questions presented by petitioners have limited jurisprudential implications outside the "unique facts" of this case (Int. Pet. 26), and any remaining significance those issues might have even in this case has been overtaken by the recent enactment of comprehensive federal tobacco legislation.

I. THE COURT OF APPEALS' INTERPRETATION OF SECTION 1964(a) IS CONSISTENT WITH THIS COURT'S PRECEDENT.

The United States elected to bring this action under 18 U.S.C. § 1964(a), which authorizes only "appropriate orders" that "prevent and restrain" RICO violations. Applying the interpretive principles established by this Court in *Porter*, *Mitchell*, and *Meghrig*, the court of appeals correctly held that the plain language of Section 1964(a)—as well as RICO's comprehensive remedial framework—limit the "appropriate" relief under that provision to forward-looking remedies that "prevent and restrain" *future* RICO violations.

A. The Text Of Section 1964(a) And RICO's Comprehensive Remedial Framework Exclude Disgorgement And Other Backward-Looking Remedies.

This Court explained in *Porter* that, "*[u]nless otherwise provided by statute*, all the inherent equitable powers of the District Court are available." 328 U.S. at 398 (emphasis added). Disgorgement and other backward-looking remedies are unavailable under Section 1964(a) because the text and structure of RICO unambiguously provide otherwise.

1. The government contends that Section 1964(a) is a "plenary grant of equitable jurisdiction."

U.S. Pet. 13. In fact, Section 1964(a) grants district courts jurisdiction only "to prevent and restrain violations of [RICO] by issuing appropriate orders." 18 U.S.C. § 1964(a). Because a court cannot "*prevent* and *restrain*" what has already occurred, jurisdiction under Section 1964(a) is necessarily "limited to forward-looking remedies that are aimed at *future* violations" of RICO. U.S. Pet. App. 113a (emphasis added); *see also Webster's New International Dictionary* 1960, 2125 (2d ed. 1955) (defining "prevent" and "restrain," respectively, as "forestall" and "hold back"). Construing Section 1964(a) to authorize remedies intended to redress *past* violations of RICO would nullify the words "prevent and restrain," and violate the canon of construction requiring courts to "give effect to every word of a statute wherever possible." *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 & n.8 (1993) (statutory language limiting remedies "must mean *something*" and cannot be rendered "superfluous") (emphasis in original). Thus, there is no basis for the government's extraordinary notion that granting district courts the power to "prevent and restrain" violations somehow vests them with precisely the same remedial power they would possess if the statute stated that courts may impose the "full range of equitable remedies."

The court of appeals' reading of the "prevent and restrain" limitation is confirmed by the fact that each of the remedies specifically enumerated in Section 1964(a) is directed at future RICO violations. The section lists three examples of remedies that are "appropriate" to "prevent and restrain" RICO violations: divestiture, reasonable restrictions on future activities, and dissolution. 18 U.S.C. § 1964(a). Each of these remedies is designed to "prevent future

violations" by directly regulating "future conduct" or "separating the criminal from the RICO enterprise" itself. U.S. Pet. App. 117a. For example, divestiture—a forced sale of assets where, unlike disgorgement, the defendant is permitted to keep the proceeds—effectuates going-forward structural changes that preclude the defendant from using the divested enterprise to commit future violations.

Disgorgement is a very different remedy. Unlike divestiture, restrictions on future activities, and dissolution, disgorgement of ill-gotten gains "is a quintessentially *backward-looking* remedy focused on remedying the effects of past conduct." U.S. Pet. App. 113a (emphasis added). This Court's own discussions of "disgorgement" confirm its backward-looking nature: The Court has repeatedly recognized that "disgorgement of improper profits . . . is a remedy only for restitution," and is therefore "limited to restoring the status quo and ordering the return of that which rightfully belongs to the [victim]." *Tull v. United States*, 481 U.S. 412, 424 (1987) (internal quotation marks omitted); *see also Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (disgorgement is "restitutionary"). Because it is designed to "restor[e] the status quo," disgorgement "is measured by the amount of prior unlawful gains and is awarded without respect to whether the defendant will act unlawfully in the future. Thus it is both aimed at and measured by *past* conduct." U.S. Pet. App. 114a (emphasis in original).

The smoking-cessation program and public education campaign proposed by petitioners also fall outside the narrow jurisdictional scope of Section 1964(a). Those proposed remedies are avowedly designed to "redress the ongoing effects of . . . violations

of RICO" that occurred in the "*past*" (U.S. Pet. 14, 19 (emphasis added)), not to "prevent and restrain" RICO violations that might occur in the *future*. Indeed, the smoking-cessation program and public education campaign are not directed at *defendants'* future behavior (much less their RICO violations), but solely at future *consumer* behavior and, just like disgorgement, are "awarded without respect to whether the defendant[s] will act unlawfully in the future." U.S. Pet. App. 114a.

The government has no serious argument to rebut these points, and intervenors fare no better with their concededly "unusual contention" that addicted smokers are "ill-gotten assets" that the proposed remedies will "divest" from defendants. Int. Pet. i, 10. Even if human beings could be deemed "assets" that can be disposed of by judicial decree—a proposition unknown in American law since the ratification of the Thirteenth Amendment—the only thing that this proposed remedy could "prevent and restrain" is future cigarette *sales*, which "are not by themselves RICO violations." U.S. Pet. App. 92a. To the contrary, the continued, legal sale of cigarettes is expressly contemplated by federal law—as Congress recently reaffirmed. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 139 (2000); *see also* Family Smoking Prevention and Tobacco Control Act ("FDA Act"), Pub. L. No. 111-31, § 907(d)(3), 123 Stat. 1776, 1803 (June 22, 2009) (prohibiting the FDA from "banning all cigarettes"). Approving petitioners' proposed remedies would thus transform Section 1964(a) from a statute targeting future *RICO*

violations into an open-ended authorization to proscribe future *lawful* conduct.[1]

2. This Court's interpretations of the Sherman and Clayton Acts remove any conceivable ambiguity as to whether disgorgement and other forward-looking remedies "prevent and restrain" RICO violations within the meaning of Section 1964(a). The Sherman and Clayton Acts authorize courts to order remedies that "prevent and restrain" antitrust violations (15 U.S.C. §§ 4, 25), and served as the model for RICO's similarly worded remedial provision. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151-52 (1987).

In the nearly 100 years since the antitrust laws were enacted, *no* court has ever interpreted the Sherman Act or Clayton Act to permit civil disgorgement. This reflects the longstanding principle that the antitrust laws' express remedies cannot be supplemented by implied equitable remedies. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981). In light of that clear limitation on courts' remedial authority under the antitrust laws, it is inconceivable that Congress would have used the same "prevent and restrain" formulation in Section 1964(a) if it had intended to authorize disgorgement. *See Holmes v. Sec. Investor Prot. Corp.*,

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[1] Petitioners' reliance on RICO's "liberal-construction mandate" is misplaced. U.S. Pet. 18. This Court has made clear that "RICO's 'liberal construction' clause . . . is not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). Notwithstanding that clause, the "purposes Congress had in mind" when it enacted RICO "must be gleaned from the statute through the normal means of interpretation." *Id.* at 184.

503 U.S. 258, 268 (1992) (courts "may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used" in the antitrust laws).

Petitioners nevertheless invoke this Court's antitrust decision in *Ford Motor Co. v. United States*, 405 U.S. 562 (1972), to support their expansive reading of Section 1964(a). Int. Pet. 24-25; *see also* U.S. Pet. 20. That case, however, considered the availability of *divestiture*, a forward-looking remedy explicitly authorized under Section 1964(a). *Ford Motor Co.*, 405 U.S. at 565. The case did not consider disgorgement or any other backward-looking remedy.

Far more pertinent is the government's decision, while litigating this case, not to pursue "disgorgement of illegal profits" in its antitrust litigation against Microsoft Corporation because it considered the remedy "not available" under the antitrust laws. 67 Fed. Reg. 12,090, 12,135 (Mar. 18, 2002). The government explained that, in a suit seeking equitable relief under a statutory provision designed to "prevent and restrain" violations, "the goals of the remedy . . . are to enjoin the unlawful conduct *[and] prevent its recurrence*." *Id.* (emphasis added). Disgorgement and other backward-looking remedies, the government reasoned, are therefore "not available." *Id.*; *see also* Br. for the United States as Amicus Curiae at 25, *Scheidler v. NOW*, 547 U.S. 9 (2006) (Nos. 04-1244 & 04-1352) (the Sherman Act and Section 1964(a) are "parallel in . . . critical respects," including that "both confer on courts 'jurisdiction' to prevent and restrain violations").

3. Moreover, the "presumption that a remedy was deliberately omitted from a statute is strongest

when," as in RICO, "Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Nw. Airlines v. Transp. Workers Union of Am.*, 451 U.S. 77, 97 (1981).[2] Congress manifestly did not "entrust[ ] to an equity court the enforcement of" RICO, guided only by "the historic power of equity to provide complete relief" (*Mitchell*, 361 U.S. at 291, 292), but instead set forth a comprehensive framework of appropriate remedies available in specific circumstances.

RICO expressly provides two mechanisms for recovering the ill-gotten gains of alleged racketeers—both of which impose procedural requirements, including trial by jury, that are inapplicable to truly equitable suits under Section 1964(a). First, Section 1963(a) expressly authorizes the government to forfeit ill-gotten proceeds in a criminal proceeding. Second, persons who have been injured by racketeering activities may bring a civil treble-damages action under Section 1964(c).

The government bypassed both of those provisions when it filed suit under Section 1964(a). It

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[2] *See also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (a "carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly") (emphasis in original; internal quotation marks omitted); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 732 (1989) ("Whatever the limits of the judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute."); *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 301 (1943) ("the specification of one remedy normally excludes another").

then sought to use that narrow equitable provision to forfeit $280 billion in defendants' past profits—*four* times the domestic defendants' current market capitalization—by proving its case to a single district court judge (and successfully urging the D.C. Circuit to apply only cursory appellate review to the district court's findings of fact (*see* U.S. Pet. App. 49a)).

Thus, petitioners' boundless interpretation of the remedies available under Section 1964(a) would not only add unauthorized remedies, but also affirmatively "subsume" the "other remedies" explicitly created by RICO, thereby undermining the statute's carefully crafted remedial framework. *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). If disgorgement were available under Section 1964(a) without meeting the procedural requirements applicable under Sections 1963(a) and 1964(c), the government would have little reason to seek to recover an alleged racketeer's ill-gotten gains under a provision other than Section 1964(a). As the Court has noted, "[t]here is no reason why Congress would bother to specify conditions under which a person may bring a . . . claim, and at the same time allow [identical] actions absent those conditions." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004).

Indeed, if the government were correct that Section 1964(a) is a "plenary grant of equitable jurisdiction" (U.S. Pet. 13), there would have been no need for Congress to have enacted that provision at all because Section 1964(a) would not impose *any* restrictions on courts' "inherent equitable powers." *Porter*, 328 U.S. at 398. Under the government's limitless conception of courts' equitable authority, RICO's general authorization in 18 U.S.C. § 1964(b) for the government to "institute proceedings" seeking equitable

relief would itself constitute a "plenary grant of equitable jurisdiction." The government's argument that Section 1964(a) does the same thing as Section 1964(b)—instead of serving as a *limit* on equitable remedies—strips Section 1964(a) of all meaning.

B. This Court's Precedent Confirms That Backward-Looking Remedies Are Unavailable Under Section 1964(a).

Petitioners stake their case for this Court's review on a purported conflict between the decision below and this Court's decisions in *Porter* and *Mitchell*. Far from conflicting with the court of appeals' holding, however, *Porter* and *Mitchell* underscore that disgorgement is *not* available because RICO's text and structure plainly "provide[ ]" otherwise. *Porter*, 328 U.S. at 398. Indeed, RICO constitutes a "clear and valid legislative command" to the contrary. *Id.*

1. In *Porter*, the Court held that the government could seek restitution of rents collected by a landlord in excess of the price ceilings established under the Emergency Price Control Act ("EPCA"), a statute with a fundamentally different text and structure from RICO. 328 U.S. at 402. EPCA broadly authorized the government to "make application to the appropriate court for an order enjoining [prohibited] acts or practices, or for an order enforcing compliance with such provision," and granted courts jurisdiction to issue "a permanent or temporary injunction, restraining order, or *other order*" when a "person *has engaged* or is about to engage in" a violation of the statute. *Id.* at 397 (emphases added).

This Court explained that, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity,

the full scope of that jurisdiction is to be recognized and applied." *Porter*, 328 U.S. at 398. The Court found no such "restrict[ion]" in EPCA because a statute authorizing an "*other* order" for past violations—in addition to prospective injunctive relief—plainly encompasses retrospective remedies. *Id.* at 399. The Court emphasized that the restitutionary relief available under EPCA was "consistent with and differ[ed] greatly from the damages and penalties" available under other provisions of the statute (*id.* at 402), and that the "legislative background of [EPCA] confirm[ed]" its "conclusion" regarding the availability of restitution. *Id.* at 400.

None of the rationales on which the Court relied in *Porter* to uphold a restitutionary remedy under EPCA is applicable to RICO. RICO *does*, "in so many words," explicitly restrict courts' equitable jurisdiction to those remedies that "prevent and restrain" future RICO violations, and therefore affirmatively excludes disgorgement and other backward-looking remedies. Moreover, RICO's comprehensive remedial framework provides other explicit mechanisms under Sections 1963(a) and 1964(c) for separating a racketeer from its ill-gotten gains. Finally, the legislative history of Section 1964(a) makes clear that this carefully crafted set of remedies is not to be supplemented with implied remedies that are unrelated to the statutory objective of "prevent[ing] and restrain[ing]" future RICO violations. *See* S. Rep. No. 91-617, at 81 n.11 (1969) ("'[T]he remedy in equity is purely *preventative*. The chancellor does not punish the defendant for what he *has done*.'") (quoting *Respass v. Commonwealth*, 115 S.W. 1131, 1132 (Ky. 1909)) (emphasis added).

The language and structure of the Fair Labor Standards Act ("FLSA") construed in *Mitchell* pro-

vide an even starker contrast to RICO. The Court held in *Mitchell* that an equitable order reimbursing employees for lost wages was an available remedy under a statute that granted courts "jurisdiction for cause shown, to restrain violations" of a provision prohibiting discharge in retaliation for the disclosure of minimum-wage and overtime violations. 361 U.S. at 296. Although the FLSA lacked some of the broad remedial language of EPCA—such as its open-ended authorization to issue "other order[s]"—the Court concluded that the FLSA lacked any textual guideposts suggesting a *limitation* of equitable remedies. As the Court saw the issue, the statute was "silent" one way or the other. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (in *Mitchell*, "this Court held, in the face of a silent statute, that district courts enjoyed the 'historic power of equity' to award lost wages").[3]

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[3] Petitioners repeatedly cite *United States v. Turkette*, 452 U.S. 576 (1981), and imply that the Court's decision in that *criminal* RICO action somehow addressed the issue in this case. U.S. Pet. 13, 14, 19, 22, 28, 29, 31; Int. Pet. 4, 15, 20, 22, 23. But the only question presented in *Turkette* was "whether the term 'enterprise' as used in RICO encompasses both legitimate and illegitimate enterprises." *Turkette*, 452 U.S. at 578. In resolving that liability question, the Court noted that the lower court had believed that the remedies collectively provided by Sections 1964(a) and 1964(c)—"divestiture, dissolution, reorganization, restrictions on future activities by violators of RICO, and treble damages"—would have utility only with respect to legitimate enterprises. *Id.* at 585. The Court disagreed, holding that the enumerated remedies could be useful regardless of whether the enterprise was ostensibly legitimate or admittedly criminal. *Id.* Needless to say, the Court's conclusion that the remedies *expressly* identified in Section 1964 do not preclude the application of RICO to legitimate enterprises

2. The court of appeals' interpretation of Section 1964(a)—and its application of *Porter* and *Mitchell*—are confirmed by this Court's decision in *Meghrig*, which construed a statute with a comprehensive and carefully circumscribed set of remedies analogous to RICO's remedial framework.

In *Meghrig*, the Court unanimously held that the Resource Conservation and Recovery Act ("RCRA")—"a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste"—does not confer jurisdiction to order "'equitable restitution'" for past cleanup costs. 516 U.S. at 482, 483. In its citizen-suit provision, RCRA grants district courts authority "'*to restrain* any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . , *to order such person to take such other action as may be necessary*, or both.'" *Id.* at 484 (quoting 42 U.S.C. § 6972(a)) (emphases in *Meghrig*).

The Court explained that "[n]either remedy"—"a mandatory injunction . . . order[ing] a responsible party to 'take action'" or "a prohibitory injunction . . . 'restrain[ing]' a responsible party from further violating RCRA"—"contemplates the award of past cleanup costs." *Meghrig*, 516 U.S. at 484. The Court's reading of the plain language of RCRA was confirmed by "a comparison between the relief available under" RCRA and the relief available under

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[Footnote continued from previous page]

hardly supports the notion that the Court has endorsed disgorgement or other remedies *not* listed in Section 1964.

CERCLA, which "expressly permits" the recovery of past cleanup costs. *Id.* at 484, 485. "Congress thus demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and that the language used to define the remedies under RCRA does not provide that remedy." *Id.* at 485.

The Court also explicitly rejected the government's reliance on *Porter* to read a remedy of "equitable restitution" into RCRA's comprehensive remedial framework and made clear that *Porter* does not reach nearly as far as the government supposes. *Meghrig*, 516 U.S. at 487. As it does here, the government argued in *Meghrig* that, under *Porter*, "district courts retain inherent authority to award any equitable remedy that is not expressly taken away from them by Congress." *Id.* The Court found the government's reliance on *Porter* to be misplaced because "the limited remedies described in [RCRA], along with the stark differences between the language of that section and the cost recovery provisions of CERCLA, amply demonstrate that Congress did not intend" for courts to find an implied remedy for equitable restitution in RCRA. *Id.* It is an "'elemental canon of statutory construction'" that, "where Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute, . . . 'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies.'" *Id.* at 487-88 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981)).

While the government has now, by dint of necessity, come around to the view that RCRA possesses several "distinctive forward-looking features" absent from RICO (U.S. Pet. 26), the reasons for confining Section 1964(a) to forward-looking relief are *at least*

as strong as the reasons for imposing similar remedial limitations on RCRA. Like the language of RCRA, the language of Section 1964(a) limits the available remedies to forward-looking relief; those temporal restrictions are doubly apparent in RICO, which requires that relief both "*prevent*" and "*restrain*" future violations. Moreover, like RCRA, RICO provides a comprehensive remedial framework that would be dramatically undermined by the availability of disgorgement. And, just as CERCLA demonstrates that Congress knows how to order backward-looking environmental remedies when it wants to, the availability of backward-looking monetary awards in the *same* statute—Sections 1963(a) and 1964(c) of RICO—even more compellingly highlights the absence of any comparable authorizing language in Section 1964(a).[4]

II. THE QUESTIONS PRESENTED DO NOT IMPLICATE A CIRCUIT SPLIT.

The government contends—in a cursory, two-paragraph argument—that the decision below conflicts with decisions of the Second and Fifth Circuits. U.S. Pet. 26-27. As was the case when this Court denied the government's petition for certiorari in 2005, however, no published appellate decision has ever upheld a disgorgement remedy under Section 1964(a). Nor has any circuit ever endorsed the

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[4] In fact, RCRA possesses several indicia of the availability of backward-looking relief that are absent from RICO, including its broad authorization to require polluters "to take such other action as may be necessary" (42 U.S.C. § 6972(a)) and its savings clause explicitly "preserving remedies under statutory and common law." *Meghrig*, 516 U.S. at 487 (citing 42 U.S.C. § 6972(f)).

sweeping proposition advanced by petitioners that purely backward-looking remedies are available under Section 1964(a). To the contrary, the Second, Fifth, and D.C. Circuits—the only circuits to have addressed the issue—all agree that Section 1964(a) is limited to forward-looking remedies. Any disagreement among those courts as to the precise contours of these remedies is purely academic and does not warrant this Court's review because petitioners acknowledge that the relief they seek is not available in *any* of these circuits.

A. In *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995), *cert. denied*, 516 U.S. 1122 (1996), the Second Circuit vacated a disgorgement award issued against a former union leader under Section 1964(a). *Id.* at 1182. The court explained that "the jurisdictional powers in § 1964(a) serve the goal of foreclosing *future* violations, and do not afford broader redress," and that the court therefore could "not see how it serves any civil RICO purpose to order disgorgement of gains ill-gotten long ago by a retiree." *Id.* (emphasis added). The Second Circuit further emphasized that "disgorgement of all ill-gotten gains may not be justified simply on the ground that whatever hurts a civil RICO violator necessarily serves to 'prevent and restrain' future RICO violations." *Id.* "If this were adequate justification," the court explained, "the phrase 'prevent and restrain' would read 'prevent, restrain and discourage,' and would allow any remedy that inflicts pain." *Id.*

Although the Second Circuit held out the possibility that a disgorgement award might be reinstated on remand if "there [was] a finding that the gains [were] being used to fund or promote the illegal conduct, or constitute capital available for that purpose" (*Carson*, 52 F.3d at 1182), neither the Second Circuit

nor any other circuit has ever upheld a disgorgement award on that ground. In fact, in the fifteen years since *Carson*, no Second Circuit decision has so much as addressed the issue.

In *Richard v. Hoechst Celanese Chemical Group, Inc.*, 355 F.3d 345 (5th Cir. 2003), *cert. denied*, 543 U.S. 917 (2004), the Fifth Circuit rejected a disgorgement claim under Section 1964(a) because the defendants had ceased production of the defective products that were the basis for the plaintiff's suit. *Id.* at 355. The court explained that the proposed disgorgement was "impermissible under § 1964(a)" because the section's "equitable remedies are available only to prevent ongoing and future conduct." *Id.* The court acknowledged that the Second Circuit in *Carson* had envisioned circumstances in which disgorgement might be available under Section 1964(a), but, like the Second Circuit, had no occasion to apply that reasoning because no facts warranted it. *Id.* at 354.

There is accordingly no circuit split on the questions presented by petitioners. As the D.C. Circuit emphasized, *no* circuit has adopted petitioners' position that Section 1964(a) authorizes purely backward-looking remedies targeting a defendant's ill-gotten gains or the ongoing effects of past RICO violations. *See* U.S. Pet. App. 92a ("Even those courts that would allow some version of disgorgement under section 1964(a) recognize that the statute is limited to preventing future violations and does not extend to future effects flowing from past violations."). Indeed, far from embracing *Carson* and *Richard*, petitioners explicitly *reject* "the limitations on disgorgement identified in" those decisions. U.S. Pet. 26-27; *see also* Int. Pet. 17.

Thus, any disagreement between the D.C. Circuit and the Second and Fifth Circuits regarding the potential availability of disgorgement under Section 1964(a) is not implicated in this case because the government never attempted to construct a disgorgement model that was limited to defendants' supposedly "available" ill-gotten gains. It has instead persisted in its view throughout this litigation that "disgorgement" is available to fund the federal fisc—as with any other penalty or fine—without regard to whether the disgorged funds represent ill-gotten gains that remain available to finance future RICO violations.

B. In an unsuccessful effort to identify a circuit split, petitioners also cite a hodgepodge of decisions that interpret *other* statutes to permit disgorgement. *See* U.S. Pet. 27-28; Int. Pet. 17-18. But this Court's cases make clear that the availability of equitable remedies turns on a particular statute's text and structure, and is not amenable to petitioners' one-size-fits-all rule. *Compare Porter*, 328 U.S. at 398, *with Meghrig*, 516 U.S. at 483. None of the other statutes invoked by petitioners includes the restrictive "prevent and restrain" language of Section 1964(a) or the structural guideposts found in RICO.

The Securities Exchange Act, for example, authorizes federal courts to grant "*any* equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5) (emphasis added). Similarly, the Commodities Exchange Act includes an "enforcement provision [that] is nearly identical to the EPCA's enforcement provision" at issue in *Porter*. *CFTC v. Wilshire Inv. Mgmt. Co.*, 531 F.3d 1339, 1344 (11th Cir. 2008).

Cases interpreting the Food, Drug, and Cosmetic Act ("FDCA") to authorize disgorgement are equally unhelpful to petitioners. Even if those decisions were correct, several of the courts that have held that disgorgement is available under the FDCA have explicitly emphasized that RICO is a distinct statute with features that clearly indicate a limited grant of equitable jurisdiction. The Tenth Circuit, for example, explained that courts' remedial authority under Section 1964(a) is restricted by "statutory language in RICO not present in the FDCA." *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1059 (10th Cir. 2006); *see also United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 233 (3d Cir. 2005) (Section 1964(a) is "far less broad than" the FDCA). Indeed, the government itself has argued that the remedial provisions of RICO and the FDCA are "fundamentally different." Mem. of Points and Authorities of the United States in Support of Mot. to Dismiss at 44, *Allergan, Inc. v. United States*, No. 09-1879 (D.D.C. Jan. 11, 2010).

III. The D.C. Circuit's Remedial Holding Has Limited Importance Outside This Unprecedented Litigation.

Petitioners' inability to meet this Court's certiorari criteria is underscored by their failure to present a question with meaningful legal implications outside the setting of this extremely unusual case. As even intervenors acknowledge, the remedial issues presented in this case are "unique" and unlikely to have widespread jurisprudential significance. Int. Pet. 15.

This case is unprecedented in numerous respects. In fact, the government's decision to seek "disgorgement" at all was itself highly unusual. In the forty years since RICO's enactment, the government had

never, until this case, sought disgorgement from a legitimate business selling a legal product. And, in those rare cases where the government had sought disgorgement, it had done so only in the context of organized crime and only for relatively minor amounts (*see, e.g.*, *Carson*, 52 F.3d at 1181)—not, as here, for an amount larger than the gross domestic product of 155 countries and forty times the size of the federal judiciary's annual budget.[5]

It is therefore unsurprising that, until this case, the government never contended that the availability of disgorgement has "potentially far-reaching implications" for its ability to obtain relief under RICO. U.S. Pet. 29. The government's longstanding lack of interest in this issue is understandable in light of the availability of RICO's criminal forfeiture remedy, which authorizes the recovery of the same monetary relief the government is attempting to obtain here through disgorgement. Indeed, the government brings criminal forfeiture actions under RICO with comparative regularity, and nothing in the decision below impairs its ability to continue to do so in the future. The government simply made the tactical decision not to invoke that remedy in this case and instead to seek a comparable recovery under Section 1964(a) without the inconvenience of having to prove its case convincingly to a jury.

Moreover, the government's case for review is even weaker now than it was in 2005 because Congress's recent enactment of the FDA Act affords the

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[5] *See* World Bank, World Development Indicators Database, *at* http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf; Administrative Office of the United States Courts, *2008 Annual Report of the Director* 7 (2009).

federal government new and extensive regulatory authority over the tobacco industry. The regulatory oversight imposed by the FDA Act subjects virtually every aspect of defendants' business to stringent government scrutiny. Thus, even if disgorgement and other backward-looking remedies were available under Section 1964(a), their availability would do little to further RICO's statutory objectives in this case because the FDA Act—together with the regulatory requirements imposed by the MSA between the tobacco industry and the States—eliminates any reasonable possibility that, with or without the disgorgement of their prior profits, defendants will engage in future racketeering conduct.

Finally, this case is an especially poor vehicle for considering the availability of disgorgement under RICO. The issue framed by the government—the availability of equitable disgorgement under RICO—is not even presented on these facts because the government's punitive attempt to extract $280 billion in prior revenue from defendants is plainly *legal*, not equitable, in nature. A purported restitutionary remedy is legal where, as here, the plaintiff seeks to impose "personal liability upon the defendant to pay a sum of money," as opposed to "restor[ing] to the plaintiff particular funds" where the plaintiff can "assert title or right to possession of particular property." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213, 214 (2002) (internal quotation marks omitted); *see also* Restatement (First) of Restitution § 215, at 866 (1937) (pointing to "necessity of tracing property" to assert equitable restitution).

Indeed, the fact that the government insists on labeling its proposed forfeiture "disgorgement" cannot obscure its obvious *legal* character. The proposed

monetary remedy is not restitution at all because the government has never indicated an intention to "restor[e] the status quo" by "ordering the return" of defendants' profits to consumers who purchased cigarettes. *Tull*, 481 U.S. at 424 (internal quotation marks omitted); *cf. Porter*, 328 U.S. at 396-97 (equitable remedy returned illegal rents to aggrieved tenants); *Mitchell*, 361 U.S. at 289 (equitable remedy reimbursed employees for lost wages). The government instead presumably intends to deposit those funds directly in the federal treasury, as it would do with any other *in personam* money judgment or any civil or criminal penalty it recovered under RICO. Accordingly, even if equitable disgorgement to *victims* were implicitly available under RICO in some narrow circumstances, that would not resolve this case because the Court is especially reluctant to infer a monetary remedy for the *government*. *See United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 314-15 (1947).

Furthermore, even if the government were correct (at 23 n.7) that disgorgement can be a forward-looking remedy because it generally deters future violations, this would be another reason that the novel type of disgorgement sought by the government would not be an equitable remedy. As this Court has held in similar settings, monetary penalties are legal in nature where they are designed "to further retribution and deterrence" and therefore "reflect[ ] more than a concern to provide equitable relief." *Tull*, 481 U.S. at 423.

To hold that the government is entitled to its requested monetary relief, the Court would also need to grapple with serious separation-of-powers and Eighth Amendment issues. The $280 billion award sought by the government—which is four times the

domestic defendants' current market capitalization—was transparently designed to put tobacco companies out of business. The government's pursuit of this potentially bankrupting remedy conflicts with Congress's recently reiterated intention that cigarettes remain legally available subject to federal regulatory oversight. FDA Act § 907(d)(3), 123 Stat. at 1803. And, any disgorgement award that is even remotely close to the astounding figure sought by the government would be "grossly disproportionat[e]" to defendants' alleged RICO violations and thus manifestly unconstitutional. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

MICHAEL A. CARVIN
Counsel of Record
ROBERT F. MCDERMOTT, JR.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Respondent R.J. Reynolds Tobacco Company

MIGUEL A. ESTRADA
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Respondent Philip Morris USA Inc.

MICHAEL B. MINTON
Counsel of Record
BRUCE D. RYDER
JASON A. WHEELER
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101
(314) 552-6000
mminton@thompsoncoburn.com

ROBERT A. LONG, JR.
JONATHAN L. MARCUS
MARK W. MOSIER
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

Counsel for Respondent Lorillard Tobacco Company

DOUGLAS G. SMITH, P.C.
Counsel of Record
RENEE D. SMITH
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654
(312) 862-2000
douglas.smith@kirkland.com

Counsel for Respondent Brown & Williamson Holdings, Inc.

GUY MILLER STRUVE
Counsel of Record
CHARLES S. DUGGAN
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4192
guy.struve@davispolk.com

Counsel for Respondent Altria Group, Inc.

May 25, 2010

APPENDIX

18 U.S.C. § 1963 provides:

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer pe-

riod. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall ex-

pire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and

the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, re-

cording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed

by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

18 U.S.C. § 1964 provides:

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable re-

strictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(4)

No. 09-994

Supreme Court, U.S.
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In The
Supreme Court of the United States

TOBACCO-FREE KIDS ACTION FUND, et al.,

Petitioners,

v.

PHILIP MORRIS USA INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

HOWARD M. CRYSTAL
Counsel of Record
KATHERINE A. MEYER
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Ave., N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206
hcrystal@meyerglitz.com

Counsel for Petitioners

Of counsel:
PROFESSOR G. ROBERT BLAKEY
William J. and Dorothy K. O'Neill Professor of Law
NOTRE DAME LAW SCHOOL*
Notre Dame, Indiana 46556
(574) 631-5717
*for identification only

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. Review Is Necessary To Resolve Several Conflicts Among The Courts Of Appeals..... 1

B. Review Is Also Necessary In Light Of Conflicts With This Court's Precedents..... 4

C. Respondents' Other Arguments Are Irrelevant..... 6

TABLE OF AUTHORITIES

Page

FEDERAL CASES

CFTC v. Wilshire Inv. Mgmt., 531 F.3d 1339 (11th Cir. 2008) 2

Ford Motor Co. v. United States, 405 U.S. 562 (1972) 6

FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960) 7

FTC v. Gem Merch. Corp., 87 F.3d 466 (11th Cir. 1996) 2

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) 9

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 7

ICC v. B&T Transp. Co., 613 F.2d 1182 (1st Cir. 1980) 2

Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996) 5, 7

Mitchell v. Robert DeMarco Jewelry, 361 U.S. 288 (1960) 1, 3, 5

PDK Labs., Inc. v. Drug Enforcement Admin., 362 F.3d 786 (D.C. Cir. 2004) 11

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 1, 3, 5

Samantar v. Yousuf, No. 08-1555, 2010 WL 2160785 (June 1, 2010) 10

TABLE OF AUTHORITIES – Continued

Page

Schine Chain Theaters v. United States, 334 U.S. 110 (1948) 6

SEC v. Cavanagh, 445 F.3d 105 (2d Cir. 2006) 9

SEC v. First City Fin. Corp., 890 F.2d 1215 (D.C. Cir. 1989) 2

Shearson/Am. Express v. McMahon, 482 U.S. 220 (1987) 7

Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379 (2008) 11

Tull v. United States, 481 U.S. 412 (1987) 9

United States v. Carson, 52 F.3d 1173 (2d Cir. 1995) 3

United States v. E.I. du Pont de Nemours & Co., 366 U.S. 334 (1961) 5

United States v. Lane Labs-USA, Inc., 427 F.3d 219 (3d Cir. 2005) 2

United States v. Philip Morris USA, Inc., 321 F. Supp. 2d 72 (D.D.C. 2004) 10

United States v. Rx Depot, Inc., 438 F.3d 1052 (10th Cir. 2006) 2, 3

United States v. Turkette, 452 U.S. 576 (1981) 4

United States v. Universal Mgmt. Servs., Inc., 191 F.3d 750 (6th Cir. 1999) 2

West v. Gibson, 527 U.S. 212 (1999) 8

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUES

7 U.S.C. § 13a-1 2

15 U.S.C. § 78u(d)(5) 3

Pub. L. No. 91-452, § 904 (codified at 18 U.S.C. § 1961 note) 8

18 U.S.C. § 1964(a) ..... *passim*

21 U.S.C. § 332(a) 2

42 U.S.C. § 6972(b)(2)(B) 7

Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) 11

REPLY BRIEF FOR THE PETITIONERS

While respondents largely argue the merits of the appeal, their arguments cannot obscure the underlying fact that petitioners meet this Court's criteria for certiorari. Indeed, in ruling that disgorgement is categorically precluded under 18 U.S.C. § 1964(a), the court of appeals itself observed that two other circuits have a different view, and the dissent explained that the majority decision created an even *broader* split in the courts of appeals regarding the proper approach to interpreting multiple federal statutes conferring broad equitable powers. 09-994 App. (Int. App.) at 142, 153-54, 185-86. Certiorari is appropriate here on that basis alone, and respondents' effort to deny these circuit conflicts, as well as their attempt to reconcile the court of appeals' ruling with this Court's own clearly applicable precedents, is unavailing.

A. Review Is Necessary To Resolve Several Conflicts Among The Courts Of Appeals.

Respondents do not acknowledge the split among the circuit courts concerning the proper interpretation of this Court's rulings in *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-99 (1946), and *Mitchell v. Robert DeMarco Jewelry*, 361 U.S. 288, 291-95 (1960). Resp. Opp. at 23-27.

1. Seven courts of appeals have interpreted grants of equitable authority indistinguishable from § 1964(a) to authorize equitable remedies like disgorgement. *See* 09-994 Pet. at 17-19. For example,

three circuit courts have *rejected* the argument that because the Federal Food, Drug, and Cosmetic Act authorizes the court to "restrain violations," 21 U.S.C. § 332(a), a district court may not award disgorgement or restitution, concluding instead that such language "invokes courts' general equity jurisdiction. . . ." *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1061 (10th Cir. 2006); *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 223 (3d Cir. 2005); *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 762 (6th Cir. 1999). Similarly, although the Commodity Exchange Act authorizes district courts to "enjoin" violations and "enforce compliance," 7 U.S.C. § 13a-1 – terms that respondents argue preclude disgorgement – numerous courts have concluded that disgorgement may be awarded under this grant of authority. *See CFTC v. Wilshire Inv. Mgmt.*, 531 F.3d 1339, 1344 (11th Cir. 2008) (noting agreement with five other circuits). Each of these circuit courts reached this conclusion by applying the interpretive principles set forth in *Porter* and *Mitchell* to the statutory language at issue.[1]

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[1] *See also FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (statute authorizing courts to "enjoin" violations interpreted to authorize disgorgement); *ICC v. B&T Transp. Co.*, 613 F.2d 1182, 1184-85 (1st Cir. 1980) (statute which "[b]y its terms . . . empower the I.C.C. to seek only prospective injunctions to restrain future conduct" interpreted to permit restitution). Moreover, when the D.C. Circuit interpreted the Securities Exchange Act to allow disgorgement "simply because" the statute "vest[s] jurisdiction in the federal courts," *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989), the court relied on similar language; the general "equity" section on which

(Continued on following page)

Moreover, respondents do not address the additional circuit split created by the D.C. Circuit's ruling that disgorgement has no impact on a defendant's *future* conduct, Int. App. at 138, 147-150, in light of the numerous other circuits that – applying *Porter*, 328 U.S. at 400 – have ruled that disgorgement *does* impact a defendant's future behavior. *E.g., Rx Depot*, 438 F.3d at 1061 ("by making illegal activity unprofitable," disgorgement "deters violations of the law").

2. Respondents argue that resolution of the split among the circuit courts of appeals as to the proper interpretation of § 1964(a) would be "purely academic" in this case. Resp. Opp. at 9. To the contrary, whether the Court adopts the more limited disgorgement approved in *United States v. Carson*, 52 F.3d 1173, 1181-82 (2d Cir. 1995), or applies *Porter* and *Mitchell* to find that § 1964(a) bestows the full scope of the district court's equitable authority, the Court's resolution of this split will both resolve the availability of disgorgement in future cases and allow the district court in this case to determine, based on the *full scope* of its equitable powers, which specific remedies will most appropriately redress the tobacco companies' far-reaching misconduct.

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respondents rely – 15 U.S.C. § 78u(d)(5) (*see* Resp. Opp. at 26) – *did not yet exist*. *See* Sarbanes-Oxley Act of 2002, § 21(d), Pub. L. No. 107-204, 116 Stat. 745, 779 (2002) (adding this provision).

B. Review Is Also Necessary In Light Of Conflicts With This Court's Precedents.

1. Respondents have relegated to a footnote, Resp. Opp. at 20 n.3, their attempt to distinguish *United States v. Turkette*, in which this Court held that, pursuant to § 1964(a), a group "associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs" may be forced to "divest the . . . *fruits of its ill-gotten gains*." 452 U.S. 576, 579, 585 (1981) (other citations omitted) (emphasis added). If a court may divest that kind of association of the "fruits of *its* ill-gotten gains," *id.* (emphasis added), the district court here may consider whether to impose remedies that would divest the tobacco company defendants of the fruits of *their* ill-gotten gains, including the millions of addicted smokers who they successfully persuaded to use their highly addictive products. *See, e.g.*, FF 2375 (tobacco company executives referring to young smokers as "Assets").[2]

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[2] While respondents are correct that, consistent with the Thirteenth Amendment, people cannot be considered "assets" as a matter of law, Resp. Opp. at 13, this does not preclude the district court from considering whether, as a *factual* matter, addicted smokers are the tobacco company respondents' financial assets. *See, e.g.*, C.A. App. at 5948 (tobacco official explaining that "if we hold these YAS [Younger Adult Smokers] for the market average of 7 years, they would be worth *over $2.1 billion in aggregate incremental profit*") (emphasis in original); *see also* C.A. App. at 5953 (the "value of [younger adult smokers] compounds over time").

2. Respondents' argument that the disgorgement and divestment remedies advocated by the Public Health Advocates are "implied equitable remedies" that would not be permissible under the antitrust laws, Resp. Opp. at 14, conflates remedies available to the *government* with those available to private parties. Whatever limitations might pertain to *private* actions – under antitrust or other laws – this Court has long recognized that a district court's "equitable powers assume an *even broader and more flexible character*" when the United States is enforceing the law. *Mitchell*, 361 U.S. at 291 (quoting *Porter*, 328 U.S. at 398) (emphasis added). This is particularly true where, as in RICO, the provision is one Congress wrote solely for use by the federal government. *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961) ("once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor").[3]

Respondents' reliance on this Court's antitrust precedents, Resp. Opp. at 14, is also misplaced. These precedents confirm that the district court's authority extends to remedies designed to address "the effects"

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[3] Many of the precedents on which respondents rely are similarly inapposite, as they involve efforts by *private* parties to invoke a court's equitable powers to recover funds for private use. *See* Resp. Opp. at 16 n.2 (citing private recovery cases); *see also Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996) (concerning *private* cost recovery).

of the tobacco companies' massive misconduct. *Ford Motor Co. v. United States*, 405 U.S. 562, 573 n.8 (1972); *see also, e.g., Schine Chain Theaters v. United States*, 334 U.S. 110, 128 (1948) (authorizing remedies "to *undo* what could have been prevented") (emphasis added). In this case the district court should be authorized to consider how best to address those effects, including, *inter alia*, whether to require the tobacco company defendants to fund targeted public education and tobacco cessation programs.[4]

C. Respondents' Other Arguments Are Irrelevant.

The remainder of respondents' arguments concern the merits or are otherwise premature at this juncture.

1. The arguments respondents advance in support of their interpretation of § 1964(a) do not withstand scrutiny.

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[4] Respondents admit that the remedies in *Ford Motor Co.* – including the requirements to guarantee existing wages and pensions and even provide jobs to any displaced workers, 405 U.S. at 572 – were "forward-looking." Resp. Opp. at 15. If these far-reaching and costly measures to restore those individuals to their condition prior to Ford's misconduct are forward-looking, then measures designed to restore addicted smokers to *their* condition prior to the tobacco companies' large-scale violations of law are also sufficiently forward-looking to be considered under § 1964(a).

First, respondents' contention that because RICO contains both civil and criminal penalties, the criminal provisions *preclude* certain civil remedies, Resp. Opp. at 4, 6, 16, 17, has already been considered and rejected by this Court. *See* Int. App. at 178-85 (citing cases); *see also Shearson/Am. Express v. McMahon*, 482 U.S. 220, 239 (1987) (rejecting argument based on the "'overlap' between RICO's civil and criminal provision"); *cf. FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 551 (1960) ("The fact that activity which falls within the civil proscription of [the antitrust laws] may also be criminal under [another section] is entirely irrelevant").[5]

Second, respondents' argument that petitioners' interpretation of § 1964(a) would render the limitations written into the provision superfluous, Resp. Opp. at 10-12, ignores the broader statutory construction question at issue here: whether § 1964(a) is a grant of limited or broad authority. Section 1964(a) authorizes district courts to issue "appropriate orders,

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[5] *Meghrig*, 516 U.S. 479, on which respondents heavily rely, *see* Resp. Opp. at 6, 21-22, is not to the contrary. The statutory scheme at issue there contains unique features, such as a provision that explicitly *prohibits* private parties from bringing suit pursuant to the statute's injunctive provision if the government takes action. 42 U.S.C. § 6972(b)(2)(B). This makes sense to avoid duplicative *injunctive* relief. However, interpreting the injunctive provision to also encompass private *cost recovery* would have led to an "absurd result" whereby a plaintiff's ability to obtain that recovery would turn on the vagaries of whether the United States participates. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

including, but not limited to," certain listed remedies. 18 U.S.C. § 1964(a) (emphasis added). If, as respondents contend, Congress crafted § 1964(a) to narrowly *constrain* a district court's remedial powers, then the court's authority should be limited to the specific enumerated remedies, as the court of appeals concluded. *See* Int. App. at 139. If, on the other hand, Congress crafted § 1964(a) to insure that a district court would have at its disposal the *full spectrum* of the court's traditional equitable authority in remedying violations of RICO, then respondents' statutory construction arguments fail. *See West v. Gibson*, 527 U.S. 212, 217 (1999) (finding that the use of the term "including" before listing several examples "makes clear that the authorization is *not limited to the specified remedies there mentioned*") (emphasis added); *see also* Pub. L. No. 91-452, § 904 (codified at 18 U.S.C. § 1961 note) (directing that "[t]he provisions of this title shall be liberally construed to effectuate [RICOS's] remedial purposes").[6]

Third, respondents assert that even if the district court possesses the full scope of its equitable powers, disgorgement is a *legal* remedy that is unavailable in

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[6] Respondents' contention that the district court may not consider targeted public education and tobacco cessation programs because they would not prevent future RICO violations, Resp. Opp. at 12-13, similarly begs the question here – *i.e.*, the required nexus between § 1964(a) remedies and a defendant's RICO violations, which in this case the district court found, and the court of appeals unanimously affirmed, are reasonably likely to continue. *See* Int. App. at 69-77.

this case. Resp. Opp. at 29-30; BATCo Opp. at 6, 13. This is also mistaken. Irrespective of whether a *private* party's request to recover money is a "legal" rather than equitable claim, *id.*, it is well-established that courts possess the equitable authority to "compel disgorgement of wrongly gained assets" in a case brought by the *government*. *SEC v. Cavanagh*, 445 F.3d 105, 120 (2d Cir. 2006) (discussing history of disgorgement as an equitable remedy); *see also Tull v. United States*, 481 U.S. 412, 424 (1987) ("an action for disgorgement of improper profits [is] traditionally considered an equitable remedy").[7]

2. Respondents also ask the Court to deny certiorari on the grounds that the United States is not entitled to the disgorgement sum advocated by the government before the court of appeals issued its disgorgement ruling. Resp. Opp. at 3, 4, 17, 28; BATCo Opp. at 2, 6. At this juncture, however, this case does not concern the appropriate *amount* of

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[7] Respondents' reliance on *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) – another *private* recovery action – is also misplaced. Resp. Opp. at 29; BATCo Opp. at 13. The Court in that case explained that "recover[y] of profits produced by [a] defendant's use of" improperly obtained property is "a form of equitable restitution" even for a private party. 534 U.S. at 214 n.2. As BATCo emphasizes, in this case most of the disgorgement sought by the government represents just this kind of "additional gains." BATCo Opp. at 3, 11. In any event, respondents also do not assert that the targeted public education and tobacco cessation remedies that petitioners contend the district court should be permitted to consider are legal rather than equitable remedies.

disgorgement – or the precise contours of any other equitable remedy. Indeed, in ruling on summary judgment that disgorgement *may* be permissible here, the district court emphasized that "there are genuine disputes over material facts which must be considered in the calculation of any disgorgement that may be ordered by this Court upon a finding of liability" – disputes "that can only be resolved at trial." *United States v. Philip Morris USA, Inc.*, 321 F. Supp. 2d 72, 81-82 (D.D.C. 2004); *see also* BATCo Opp. at 5 (acknowledging that the district court "deferred until trial" the scope of the disgorgement remedy). Those disputes were never resolved because of the interlocutory ruling barring disgorgement, which led the district court to decline consideration of *any* of these remedies. Int. App. at 212, 240-241, 248-250.[8]

Therefore, this appeal concerns only the threshold question of whether the *kind* of equitable remedies plaintiffs seek are available under § 1964(a), not whether they will be awarded in this case. Once that threshold question is resolved, the matter should be remanded to the district court to address the contours of specific remedies. *See Samantar v. Yousuf*, No. 08-1555, 2010 WL 2160785, at *2 (S. Ct. June 1, 2010) ("whether [the defendant] may have other valid

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[8] BATCos references to witnesses who "testified," BATCo Opp. at 3, refers to pre-trial testimony.

defenses to the grave charges against him, are matters to be addressed in the first instance by the District Court on remand"); *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("[I]f it is not necessary to decide more, it is necessary not to decide more") (Roberts, J., concurring).[9]

Respondents similarly assert that the remedies plaintiffs seek are inappropriate in light of the enactment in June 2009 of the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009). *See* Resp. Opp. at 29; BATCo Opp. at 9. This argument also belongs before the district court in the first instance to decide whether – in light of its restored equitable powers; the new legislation; and any other developments – equitable remedies such as those sought by plaintiffs are appropriate in this case. *E.g., Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 381 (2008) ("we vacate the judgment of the Court of Appeals and remand for the District Court to conduct the relevant inquiry under

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[9] Respondents' acknowledgment that by the time this issue reached summary judgment the government had already reduced its disgorgement request by more than *60%*, *see* BATCo Opp. at 10, highlights respondents' understanding that it is premature to contest the scope of any disgorgement award until the government demonstrates the appropriate amount, and the district court first has an opportunity to consider precisely what remedies to impose. The same approach should govern BATCo's concerns regarding joint and several liability. *See* BATCo Opp. at 3.

the appropriate standard"). Accordingly, these matters are not before this Court at this time, and are not bases on which the Court should resolve petitioners' request for certiorari.[10]

* * *

For the foregoing reasons and those stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD M. CRYSTAL
Counsel of Record
KATHERINE A. MEYER
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Ave., N.W.,
Suite 700
Washington, D.C. 20009
(202) 588-5206
hcrystal@meyerglitz.com
Counsel for Petitioners

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[10] Contrary to respondents' contention, the government's *prior* petition for certiorari in this case is also completely irrelevant. Resp. Opp. at 2, 9; BATCo Opp. at 8. In urging the Court to deny that petition, the tobacco company defendants argued that review was "premature," and that "[i]f the government is dissatisfied with the outcome of any appeal from the final judgment, it can pursue review in this Court then," Brief in Opposition at 2, United States v. Philip Morris USA, Inc., No. 05-92 (S.Ct. Sept. 16, 2005) – precisely what has occurred.

Of counsel:
PROFESSOR G. ROBERT BLAKEY
William J. and Dorothy K. O'Neill
Professor of Law
NOTRE DAME LAW SCHOOL*
Notre Dame, Indiana 46556
(574) 631-5717
*for identification only